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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56617

ELIZABETH AGUILERA; PHILLIP ARELLANO; BENJAMIN BARDON; GUSTAVO CARRILLO; HECTOR RAMIREZ,

Plaintiffs-Appellants,

v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES; WILLIAM STONICH, INDIVIDUALLY AND AS UNDER SHERIFF OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; LARRY WALDIE, INDIVIDUALLY AND AS ASSISTANT SHERIFF OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; WILLIAM MCSWEENEY, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; NEIL TYLER, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; THOMAS ANGEL, INDIVIDUALLY AND AS COMMANDER OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ARTHUR NG, INDIVIDUALLY AND AS CAPTAIN OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ALAN SMITH, INDIVIDUALLY AND AS LIEUTENANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; MARGARET WAGNER, INDIVIDUALLY AND AS LIEUTENANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; RUSSELL KAGY, INDIVIDUALLY AND AS SERGEANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; BRIAN PROCTOR, INDIVIDUALLY AND AS SERGEANT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; COUNTY OF LOS ANGELES, A MUNICIPAL CORPORATION,

Defendants-Appellees.

Argued and Submitted July 10, 2007
Filed Dec. 27, 2007

Before: ALEX KOZINSKI, Chief Judge, ANDREW J. KLEINFELD, and RICHARD C. TALLMAN, Circuit Judges.

Opinion by Judge TALLMAN; Dissent by Chief Judge KOZINSKI.

TALLMAN, Circuit Judge:

Plaintiffs, various Los Angeles County sheriff's deputies, appeal an adverse summary judgment in favor of Sheriff Leroy Baca, the Sheriff's Department, other supervisory officers, and internal affairs investigators. The deputies allege that they were improperly detained at the East Los Angeles Sheriff's Station and later punished through involuntary shift transfers for failing to give non-privileged statements in connection with an internal criminal civil rights investigation of their possible misconduct while on uniformed patrol duty. The deputies alleged § 1983[1] violations of their own Fourth Amendment right to be free from unreasonable seizures, their Fifth Amendment due process right against compelled self-incrimination, and their Fourteenth Amendment due

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[1] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

process rights to be free from coercive police questioning and governmental conduct that shocks the conscience. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Shortly after 1:30 a.m. on September 5, 2002, Lieutenant Abel Moreno, the Watch Commander on duty at the East Los Angeles Sheriff's Station, learned that a citizen had been hospitalized with injuries to his head and back due to an alleged assault with a baton or flashlight without provocation by a uniformed deputy. The victim, Martin Flores, had been a bystander at the scene of a narcotics investigation when he was allegedly assaulted. The deputies were present while a search warrant was being executed by narcotics officers.

Sheriff's Department supervisors immediately initiated an internal affairs investigation into victim Flores's complaint of deputy misconduct. Sergeant Burke went to the hospital and obtained a videotaped statement from complainant Flores. Burke observed obvious physical injuries suffered by Flores. Burke then returned to the station, conferred with his superiors, and informed the deputies who had been at the scene of the search that, at the end of their patrol shift at approximately 6:00 a.m., they should return to the station. They were instructed not to leave work before speaking to internal affairs investigators.

Shortly before 6 a.m., Burke and Moreno informed plaintiff Elizabeth Aguilera that she and the other deputies were now the focus of an internal criminal investigation. The Los Angeles County Sheriff's Department has two separate internal investigation units: the Internal Affairs Bureau ("IAB"), which

investigates allegations of an administrative nature and can recommend employee discipline up to and including termination; and the Internal Criminal Investigation Bureau ("ICIB"), which only investigates allegations of a criminal nature for presentation to prosecuting attorneys who can pursue criminal charges against employees.

The deputies, each of whom had served in sworn law enforcement positions for five to twenty years with the Department, were familiar with Sheriff's Department policies and procedures regarding internal criminal investigations. Under the Sheriff's Department's Manual of Policies and Procedures, officers have an affirmative duty to cooperate during such an investigation. A failure to cooperate can subject a deputy to administrative discipline. The Department's policies allowed it to require its employees to remain at work beyond their normal shift. When this occurs, the Department compensates its personnel at overtime rates. The deputies had received training on how to manage and process persons suspected of criminal activity.

While the deputies waited at the station to be interviewed, they were told to remain in the report writing room, the basement roll call briefing room, and then the COPS team office, all of which were unlocked. While they were waiting, several supervisors later named as defendants entered the office intermittently to ask if the deputies needed anything to eat or drink. A drinking fountain was available. No one asked the deputies to relinquish their weapons or badges. The deputies were allowed to talk with each other, sleep, make and receive telephone calls, and travel to the bathroom unescorted.

The deputies were never placed under arrest, searched, physically restrained, or otherwise touched or subjected to the use of force. No deputy asked permission to leave the station. While waiting to be interviewed, the deputies completed overtime slips. They later received overtime pay or were otherwise compensated for all time spent at the station after their regular shift had ended.

At approximately 6:30 a.m., the deputies were called to Captain Thomas Angel's office, the Commanding Officer of the East Los Angeles Station. According to the deputies, Captain Angel announced, in a harsh, accusatory manner, that he knew that one of them had used excessive force on Flores, that the others were covering it up, and that one or more of them could be criminally prosecuted or fired for doing so. Captain Angel informed the deputies that the only way to avoid criminal charges was to "come forward now," which they understood to mean to give an immediate and voluntary statement to the ICIB investigators without any protection against later use of such statements against them.

At around 11:30 a.m. or noon, Sergeant Russell Kagy of the ICIB, the lead criminal investigator assigned to the case, began interviewing each deputy sheriff individually. Kagy asked each deputy if he or she would provide a statement, and each declined based on the advice of counsel. No deputy was asked to waive his or her right against having any statement used against him or her in a later criminal proceeding, and no deputy gave either a compelled or voluntary statement at this time. The deputies were advised by Sergeant Kagy that they were not yet formally considered suspects, but at this time they could not be eliminated as suspects either. After

each deputy declined to give a statement, Kagy terminated the interview, and the deputies were told they were free to leave the station.

None of the deputies under suspicion could initially be cleared of wrongdoing, and they were each then reassigned from their respective street patrol duties to station duties pending completion of the ongoing investigation into possible criminal violations of the civil rights of Flores. Each deputy attests that the reassignment led to personal hardship.[2] Captain Angel asked each deputy to provide a written memorandum setting forth the specific circumstances of his or her hardship and how it related to the reassignments, but he did not receive any memoranda in response to his request. The deputies concede that the Department could change their shifts and assignments at will, and that being transferred to different shifts is a fairly common practice within the Sheriff's Department.

In the following two months, Sergeant Kagy conducted a thorough investigation into the events of September 5, 2002. Coordinating with prosecutors from the Los Angeles County District Attorney's

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[2] Certain deputies allege that their temporary positions afforded decreased opportunity for earning overtime. However, according to the collective bargaining agreement negotiated between the Department and the deputies' bargaining representative (the Association for Los Angeles Deputy Sheriffs), deputies who are being investigated internally are not necessarily entitled to overtime assignments substantially related to the matters under inquiry. We read this agreement to mean that deputies being investigated for unlawfully assaulting a member of the public may not be entitled to overtime work assignments in the field involving unsupervised interactions with the public in case the complaint is later sustained by the results of the internal investigation.

Office and the United States Attorney's Office for the Central District of California, Kagy communicated and met with approximately two dozen individuals; reviewed Department files and audiotapes; and gathered medical records, 911 communication records, and photographs. In August 2003, Sergeant Kagy submitted the case investigation report to the District Attorney's Office for its consideration of filing criminal charges.

In September 2003, the District Attorney's Office requested compelled statements from deputies Aguilera, Ramirez, Carrillo and Arellano. During the process of extracting these compelled statements, none of the deputies were asked to waive his or her constitutional right against having the statement used against him or her in a criminal proceeding. Within days of providing their compelled statements to the investigators, the four deputies were cleared by their supervisors and restored to their pre-investigation duty assignments. Most of the deputies were reassigned in early October 2003. Deputy Bardon was not reassigned until December 2003 when the District Attorney declined to file criminal charges against him. No federal criminal charges were ever brought.

II

We review a grant of summary judgment de novo. *Jones v. Union Pacific R.R. Co.*, 968 F.2d 937, 940 (9th Cir.1992). An order granting summary judgment will only be affirmed if the evidence, read in the light most favorable to the non-moving party, demonstrates the absence of a genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Taylor v. List*, 880 F.2d 1040, 1044 (9th Cir.1989).

Also subject to de novo review is the district court's grant of qualified immunity. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Under *Saucier v. Katz*, 533 U.S. 194, 201 (2001), we take a two-step approach in determining whether the defendant supervisors are entitled to qualified immunity. First, we determine whether the supervisors violated the deputies' constitutional rights. *See id.* If we answer in the affirmative, we proceed to determine whether that right was "clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See id.* at 201-02. If we determine at the first step that no constitutional violation occurred, the qualified immunity inquiry is at an end. *See id.* at 201.

III

The deputies argue that their detention at their duty station pending questioning amounted to an impermissible seizure under the Fourth Amendment. We have not, before today, had occasion to address whether and under what circumstances a law enforcement officer is seized under the Fourth Amendment when he is ordered by his supervisor to remain at a designated location for questioning about the officer's possible official misconduct triggering a criminal investigation. "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (internal quotation marks omitted). A seizure occurs when an individual submits to a show of lawful authority or

an application of physical force by a law enforcement agent. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991). An encounter between an officer and an individual "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

The application of the Fourth Amendment to the employment context presents special issues. While "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Constitution does not afford public employees greater workplace rights than those enjoyed by their private sector counterparts. When determining whether a superior law enforcement officer "seized" a subordinate, we must glean from the circumstances whether the subordinate's decision to heed his superior's order to remain at a designated location stemmed from a fear, if he tried to leave, of physical detention, or merely adverse employment consequences.

We are mindful that, "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 U.S. 210, 218 (1984). This is particularly so in the paramilitary environment of a police agency that is both a law enforcer and a public employer. Police and sheriff's departments must frequently abide by collective bargaining agreements that govern in great detail the terms and conditions of the workplace. But society has an equally important interest in ensuring the highest integrity by those entrusted with discharging the duties of a peace officer.

As a preliminary matter, we hold that a law enforcement agency has the authority as an employer to direct its officers to remain on duty and to answer questions from supervisory officers as part of a criminal investigation into the subordinates' alleged misconduct. *See Driebel v. City of Milwaukee*, 298 F.3d 622, 638 (7th Cir. 2002); *United States v. Muegge*, 225 F.3d 1267, 1270 (11th Cir. 2000) (per curiam) (finding no seizure when an on-duty civilian Air Force employee was ordered to report for an interview with an intelligence officer); *United States v. Baird*, 851 F.2d 376, 380-82 (D.C. Cir. 1988) (finding no seizure when an on-duty Coast Guard officer was ordered to report for an interview with an intelligence officer).[3] A law enforcement officer is not

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[3] The dissent chastises us for our "selective reading" of *Baird*, *Muegge*, and *Driebel*, because in those cases the officers were either specifically told that their interviews were voluntary, *Baird*, 851 F.2d at 378, 380, 383; *Muegge*, 225 F.3d at 1270, or that they were not suspected of a particular crime, *Driebel*, 298 F.3d at 648. Although these statements certainly were factors that militated in favor of a finding that the officers were not in custody, they do not, as the dissent suggests, create a bright-line rule that the employer must unequivocally announce which "hat" (employer or law enforcement agent) it is wearing. Indeed, the case-by-case, fact specific inquiry has remained the same for several years and "is simply whether there is a formal arrest or restraint on movement of the degree associated with formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal quotation marks omitted). This is particularly so where the employer is a law enforcement agency and the employee is a sworn peace officer specially trained in constitutional rights attending the law of arrest. We can presume a greater degree of sophistication on that subject by these deputies than we would presume of the lay civil rights plaintiff encountering a police investigation for the first time. Further, the existence of a collective bargaining agreement that imposes a specific duty on police employees to cooperate in internal affairs

seized for purposes of the Fourth Amendment simply because a supervisor orders him to remain at work after the termination of his shift or to come into the station to submit to questioning about the discharge of his duties as a peace officer. *See Driebel*, 298 F.3d at 638. In the case at bar, if the deputies had refused to wait at the station to be questioned regarding the events of September 5, 2002, or otherwise failed to cooperate in the criminal investigation, they could have been subject to administrative discipline including termination. However, while a law enforcement agency can order its employees to cooperate in a criminal investigation as a condition of their continued employment subject to the Constitution, it may not seize its employees and detain them against their will without probable cause.[4] *See id.* at 639; *Cerrone v. Brown*, 246 F.3d 194, 201 (2d Cir. 2001). Nor may compelled statements be obtained in violation of their constitutional rights against self-incrimination without the protection afforded by Supreme Court decisions we discuss below.

The first issue, then, is whether the deputies were seized without the existence of probable cause. Since the Fourth Amendment does not protect against the threat of demotions or job loss, the relevant constitutional inquiry is whether a reasonable deputy in the position of the plaintiffs would have feared detention if he had refused to obey the commands of his supe-

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investigations makes the context quite different from the run-of-the-mine civil rights case.

[4] A superior law enforcement officer may briefly stop and question a subordinate officer consistent with the holding in *Terry v. Ohio*, 392 U.S. 1 (1968), as any police officer may do when he has a reasonable suspicion that criminal activity may be afoot.

rior officers. *See United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981). Within this context, we must distinguish between a department's actions in its capacity as an employer and its actions as the law enforcement arm of the state. *See Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity*, 385 U.S. at 493.

In identifying which circumstances are most salient to our analysis of whether a seizure took place, we find instructive the Seventh Circuit's analysis in *Driebel*, 298 F.3d at 622. There, our sister appellate court considered the Fourth Amendment claims of four police officers who had been ordered to remain on duty or to accompany detectives to headquarters and answer questions during the course of an internal criminal investigation of possible misconduct involving the acquisition by police officers of unregistered firearms from nefarious sources. The court determined that two officers had been seized when detectives surveilled a pickup point and uniformed officers arrived to retrieve the weapons hidden in a dumpster. The court determined that two others had not been seized but merely submitted to conditions of their employment when ordered to return to the station for further questioning. *See id.* at 641.

The Seventh Circuit emphasized the following factors as critical to its calculus of whether a seizure had taken place: the experience level of the subordinate officer, *see id.* at 647; whether the treatment was consistent with that allowed by department guidelines or general policy, *see id.* at 649 n. 16; the occurrence of physical contact or threats of physical restraint, *see id.* at 646, 647, 649 & n. 16; explicit refusal of permission to depart, *see id.* at 649 n. 16; isolation of the subordinate officer, *see id.* at 643, 649

n. 16; permission to use the restroom without accompaniment, *see id.* at 648, 649 n. 16; the subordinate officer's being informed that he was the subject of a criminal investigation, *see id.* at 643; whether the subordinate officer was spoken to "in a menacing or threatening manner," *see id.* at 648, 649 n. 16; whether the subordinate officer was under constant surveillance, *see id.* at 646; whether superior officers denied a request to contact an attorney or union representative, *see id.* at 648; the subordinate officer's ability to retain law enforcement equipment, including weapons and badges, *see id.* at 643, 648, 649 n. 16; the duration of detention, *see id.* at 646; and the subordinate officer's receipt of overtime pay, *see id.* at 643.

We adopt the reasoning articulated in *Driebel.* Applying these factors to the detention of the deputies in the case at bar, we hold that they were not seized within the meaning of the Fourth Amendment. Each deputy had at least five years of experience and testified to his or her familiarity with the Department's policies and state criminal law. The deputies were well versed through their police academy and on-the-job training in Department procedures regarding the manner in which individuals are placed under arrest and the Department's statutory and contractual authority to order officers to remain at work on overtime. In addition, each deputy accepted as a condition of his or her employment the official policy that he or she must cooperate with other members of the Department conducting an internal criminal investigation.

While the deputies waited to be interviewed, the Department did not employ standard procedures for detaining criminal suspects at the station, such as

searching them, booking them, and inventorying their possessions. The deputies must have been aware that, without probable cause, no superior officer was permitted to use force or any show of authority to prevent them from departing the station if they so chose. While the deputies obviously understood that any violation of the order not to leave work might breach administrative rules and could result in their discipline as employees, we do not think that prospect is sufficient to classify this situation as a criminal seizure.

The Department did not create a coercive environment in which to detain the deputies. The deputies were not transported to the station against their will. They were not held in a cell, but rather in unlocked rooms with intermittent supervision. The Department did not refuse any deputy's request to depart (though no one asked to leave). Supervisors repeatedly asked the deputies if they wanted food or drink and allowed them to travel to the restroom and water fountain unaccompanied. The deputies were not prevented from phoning their attorney or union representative for legal or contractual advice and remained in possession of their Department-issued equipment, including weapons and badges. The deputies were never touched or threatened with physical restraint. They were not isolated from one another or prohibited from speaking with one another. After the deputies were questioned and declined to provide an unprotected statement, they were immediately allowed to leave the station. All were paid overtime. In short, the deputies were not treated like criminal suspects, and they should have known – given their training, years on the force, and familiarity with Department procedures and protocol

– that, if they chose to leave the station in defiance of their supervisors' orders, they might have been subject to administrative discipline but could not have been forcibly detained absent full physical arrest.

Admittedly, some factors militate toward finding that a seizure took place. In particular, the deputies were informed that they were under criminal investigation. In addition, Captain Angel, the highest ranking officer at the station, conveyed in a "harsh, accusatory tone" his belief that one of the deputies had assaulted Flores, he insinuated that the others were covering it up, and he further warned that one or more of them would go to prison and lose their jobs if they were involved in such behavior. While the message may have been delivered in a harsh tone of voice to convince his subordinates that the Captain meant what he said in the hopes of piercing the "blue shield" of silence he thought he was facing, we are not prepared to believe that trained deputy sheriffs would nonetheless have been confused as to their legal and contractual rights under the circumstances. We believe that a reasonable deputy in the plaintiffs' position would have understood that he was ordered to report and remain at the station until interviewed by ICIB investigators, and that he would likely suffer criminal civil rights prosecution and administrative discipline if the evidence revealed his involvement in the assault of Flores. However, these facts are not sufficient, in and of themselves, to transform the deputies' voluntary accession to their supervisors' order to remain at work into a seizure cognizable as an arrest under the Fourth Amendment.

We decline to hold that the deputies were seized by their supervisors' orders, which were issued in accordance with Department policies, to cooperate with a

necessary internal criminal investigation. To hold otherwise would equate to a pronouncement that a law enforcement agency cannot, even under negotiated provisions of a labor agreement or the agency's general policies to preserve public confidence and the integrity of its personnel in the discharge of their public safety responsibilities, order its employees to cooperate in an investigation of possible officer misconduct by standing by at their duty station after the end of their watch. We do not intend to, and will not, act as a super-personnel board to micromanage the employment actions of law enforcement professionals. "Law enforcement agencies are entitled to deference, within reason, in the execution of policies and administrative practices that are designed to preserve and maintain security, confidentiality, internal order, and esprit de corps among their employees." *Driebel*, 298 F.3d at 648. We affirm the district court's grant of summary judgment on the deputies' Fourth Amendment claim.

IV

The deputies contend they were deprived of their Fifth Amendment right (made applicable to the states by the Fourteenth Amendment) against self-incrimination. The deputies argue that supervisors violated this right by forcing them to choose between giving a voluntary, non-immunized statement that could be used against them in subsequent criminal or administrative proceedings and retaining their current job assignments and work shifts. The deputies' argument is unavailing.

In a series of cases involving the Fifth Amendment rights of public employees, the Supreme Court has made clear that public employees cannot be compelled to choose between providing unprotected

incriminating testimony or losing their jobs. *See Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (holding that the discharge of city employees for refusing to sign waivers of immunity or for invoking their privilege against self-incrimination violated the Fifth Amendment); *Gardner*, 392 U.S. at 273 (same); *Garrity*, 385 U.S. at 493 (holding that the state cannot use the incriminatory statement of an employee secured under threat of job loss in a subsequent criminal proceeding); *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (holding that the "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized").

The Court was careful, however, to preserve the right of a public employer to appropriately question an employee about matters relating to the employee's possible misconduct while on duty. In *Gardner*, the Court noted that the constitutional violation arose not when a public employee was compelled to answer job-related questions, but when that employee was required to waive his privilege against self-incrimination while answering his employer's legitimate job-related questions. *See* 392 U.S. at 278. If the officer "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal." *Id.* (footnote and citation omitted); *see also Uniformed Sanitation Men*, 392 U.S. at 284; *Lefkowitz*, 431 U.S. at 806 ("Public employees may constitutionally be

discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity."); *Chavez v. Martinez*, 538 U.S. 760, 768-69 & n. 2 (2003) (outlining the scope of public employees' rights under the Fifth Amendment self-incrimination clause). "This language strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege." *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 (4th Cir. 1995).

We hold that the supervisors did not violate the deputies' Fifth Amendment rights when they were questioned about possible misconduct, given that the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination. Indeed, it appears that the deputies were never even *asked* to waive their immunity.[5] In

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[5] Our colleague in dissent maintains that there is a factual dispute as to whether the officers were compelled to make incriminating statements. If compelled, on the one hand, the officers automatically would be entitled to immunity for any incriminating statements they made. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). If not under compulsion, on the other hand, then they had the constitutional right to remain silent without fear of punishment. *Lefkowitz*, 414 U.S. at 84-85. The factual dispute arises, the dissent insists, because Captain Angel, "by including the risk of prison as one of the consequences of not speaking . . . was clearly doing something other than giving a command to a subordinate." Dissent at [29a].

However, as the Supreme Court emphasized in *Gardner*, the Constitution is offended not when an officer is compelled to answer job-related questions, but only when the officer is required to waive his privilege against self incrimination while answering legitimate job-related questions. 392 U.S. at 278.

these circumstances, it is clear that the deputies' Fifth Amendment right against self-incrimination was not implicated by the supervisors' conduct. *See Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (holding that "[t]he Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers"); *Wiley*, 48 F.3d 773 (holding that officers' Fifth Amendment rights were not violated given that the officers had not been asked to waive their privilege against self-incrimination and the questions posed to them were narrowly job-related).[6] It is of no moment that refusing to answer

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Although there may have been some initial coercion to *cooperate and answer* questions, the record does not support a triable issue of fact as to whether the tandem requirement of *compelling* the officers to waive their Fifth Amendment rights was met. *Wiley*, 48 F.3d at 777 (reasoning that "forcing a public employee to answer potentially incriminating job-related questions *does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege*") (emphasis added). Indeed, the deputies were not asked to waive their immunity. Nor were any statements ever used against them.

[6] The dissent believes that the only constitutionally permissible rule is one that would require public employers to expressly inform employees that "any statements they give can't be used against them in criminal proceedings" before taking disciplinary action against the employee for refusing to speak. Dissent at [30a]. This rule, it retorts, would be "easy as pie" to administer and no legitimate argument exists against such an approach. Dissent at [33a]. Indeed, the dissent complains, by adopting "the harsh and unfair rule of the Fifth and Eighth Circuits, [w]e permit[] the government to punish police officers who refuse to make self-incriminating statements, even though they may not be sure whether or not they have immunity." Dissent at [30a].

the investigator's questions could have resulted (and, in fact, did result) in reassignment: We do not consider re-assignment from field to desk duty as equivalent to losing one's job under *Gardner*, 392 U.S. at 273.[7]

Despite the facial appeal of the rule that the dissent would like us to apply with twenty-twenty hindsight, the contours of permissible public employer conduct have been articulated by the Supreme Court. It is well established that a police supervisor may not compel a subordinate to waive his privilege against self-incrimination. *Gardner*, 392 U.S. at 278. But this mandate does not, as the dissent suggests, require the adoption of the dissent's bright-line rule, adopted by the Second, Seventh, and Federal Circuits. *See Weston v. United States Dep't. of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 & n. 4 (7th Cir. 1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 426 F.2d 619, 621, 627 (2d Cir. 1970).

No matter how appealing such a variation on Supreme Court precedent may be, the rule is not required by *Gardner*. Significantly, the dissent continually glosses over critical facts. Although it notes that *Miranda* warnings have "become part of our national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000), this case involves deputies who are charged with administering *Miranda* warnings to suspects in the course of their official duties. These deputies had at least five years experience each, testified to familiarity with Department policy and criminal law, and were versed in the Department's procedures for placing suspects under arrest. Finally, to impose this bright-line rule, and therefore liability on the supervisors, would be unnecessarily harsh and in contravention of basic qualified immunity principles. *Gardner* does not require, nor is it clearly established law in our circuit, that a public employer must expressly inform an employee that his statements regarding actions within the course and scope of his employment cannot be used against him in a criminal proceeding before taking administrative action against that employee. *See Saucier*, 533 U.S. at 202.

[7] The dissent bemoans this *dicta* statement because the Supreme Court has rejected the notion that actions short of

The deputies' Fifth Amendment claim also fails because the deputies were never charged with a crime, and no incriminating use of their statements has ever been made. In *Chavez*, 538 U.S. at 769 (plurality opinion),[8] the Supreme Court held that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." Only after a compelled incriminating statement is used in a criminal proceeding has an accused suffered the requisite constitutional injury for purposes of a § 1983 action. *See id.*; *United States v. Antelope*, 395 F.3d 1128, 1140-41 (9th Cir. 2005) (discussing *Chavez* and limiting the reach of its holding to the context of § 1983 actions); *see also Lingler v. Fechko*, 312 F.3d 237, 240 (6th Cir. 2002) (holding that a police officer's Fifth Amendment right was not violated because he had not been compelled to waive his privilege against self-incrimination and his statements were never used against him in subsequent

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firing a public employee cannot form the basis of a viable Fifth Amendment claim. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n. 8 (1990) (reasoning that "even an act as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her [constitutional] rights," offends the Constitution) (internal quotation marks omitted). This point is largely moot because we agree with the district court's observation that the supervisors' actions in this case "w[ere] [not] done to punish [the deputies] for asserting their constitutional rights." Dissent at [34a].

[8] Agreeing on this holding were Chief Justice Rehnquist and Justices Thomas, O'Connor, Scalia, Souter, and Breyer. *See id.* at 763, 773 (Op. of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, J.J.); *id.* at 777-79 (Op. of Souter, J., joined by Breyer, J.). *See McKinley v. City of Mansfield*, 404 F.3d 418, 431 n. 12 (6th Cir. 2005).

criminal proceedings).[9] We affirm the district court's grant of summary judgment on this claim.

V

The deputies argue that the district court erred in concluding that the supervisors' conduct did not violate the deputies' Fourteenth Amendment substantive due process rights. In our view, the Sheriff's Department had a legitimate need to determine whether an officer or officers had engaged in criminal behavior under color of office and, until that criminal investigation was resolved, it had a duty to protect the public from the potential for further assaults by the unknown deputy potentially responsible by reassigning all of those involved in the incident to station duty. Even assuming that the deputies were assigned to less favorable shifts and given "degrading" employment positions, we agree with the district court that the reassignment did not transform the questioning into a coercive police investigation under *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992). We also agree that a reassignment, even as punishment for failure to make a voluntary statement, does not "shock[] the conscience" or run counter to the "decencies of civilized conduct" under *Rochin v. California*, 342 U.S. 165 (1952). We affirm the grant of summary judgment on these claims.

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[9] The dissent makes too much of our citation to *Chavez v. Martinez*, 538 U.S. at 760. Plainly, *Chavez* applies in situations where a party actually makes an incriminating statement and the government then decides to use it in a criminal proceeding. If it does so, the Fifth Amendment is violated. Otherwise, it is not. Here, we rely on the rule in *Chavez* primarily for the proposition that since no statement was ever used against the deputies, there is no cognizable Fifth Amendment claim.

VI

The district court disregarded police reports of Sergeant Kagy's internal investigation, which documented the allegations against the deputies, on the basis that they constituted inadmissible hearsay and were not sufficiently reliable to qualify for the business records exception. *See* Fed.R.Evid. 803(6). The deputies contend on appeal that they offered the reports for the non-hearsay purpose of proving the supervisors' knowledge of exculpatory facts clearing the deputies of the alleged misconduct on a date much earlier than that on which their former field duties were restored. However, even if the district court erred in failing to consider the reports, we find any error harmless since, even considering the information in the reports, the deputies' Fifth Amendment and Fourteenth Amendment claims fail as a matter of law.

VII

Because we find that the supervisors did not violate the deputies' Fourth, Fifth, or Fourteenth Amendment rights, we affirm the district court's grant of summary judgment in favor of all defendants. Since no violation of any constitutional right occurred, we need not reach the claim against the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). It too was properly dismissed.

AFFIRMED.

KOZINSKI, Chief Judge, dissenting for the most part:

When a law enforcement agency suspects one of its employees of criminal wrongdoing, their relationship becomes a strained and complex one. The employer, of course, retains all powers over the employee qua employer – it may ask him to work overtime, complete reports, answer the questions of supervisors and generally comply with the terms of the employment relationship. In addition, however, the employer is also in the business of detecting and prosecuting criminal activity, so the employer can – and generally has the duty to – gather evidence that may be used to prosecute the employee and others.

Whether the employer is wearing one hat or the other (or both) is often unclear, which can put the employee in a precarious situation by forcing him to choose between disobeying an order from his employer and giving up the constitutional privilege against self-incrimination. In such situations, the employer must not play on this ambiguity to the disadvantage of the employee; rather, it must clarify whether it is questioning the employee in its capacity as an employer or as a law enforcer. Where the employer fails to do this, the employee is entitled to act on the assumption that he is dealing with a law enforcement agency, if a reasonable person in his position would have so believed. Plaintiffs here easily meet this standard, and so they are entitled to bring their case before a jury; this is precisely the kind of conflict that a group of citizens drawn from the community is in the best position to resolve.

1. Arrest Without Probable Cause

Plaintiffs here presented a triable issue of fact on their claim that they were arrested without probable

cause because a jury could find, on the evidence presented, that reasonable people in plaintiffs' position would have believed they were placed under arrest and not merely asked to work overtime. As the majority admits with commendable candor, there is evidence that "militate[s] toward finding that a seizure took place." Maj. op. at [15a]. After all, plaintiffs were told they were under criminal investigation, and they were interviewed by the Internal Criminal Investigation Bureau (ICIB), which investigates only criminal allegations against employees. *Id.* at [5a]. Moreover, plaintiffs' superior, Captain Angel, speaking in a "harsh, accusatory manner," told them that he knew one of them had used excessive force on Flores, that the others were covering up and that one or more of them would go to prison and lose their jobs unless they gave statements. *Id.*

The majority relies on three cases in support of its finding that plaintiffs were not detained, but cites them only selectively. *Id.* at [10a-11a]. *United States v. Baird*, 851 F.2d 376 (D.C. Cir. 1988), found no seizure because the Coast Guard officer there was told that the interview was "voluntary" and that he "was free to go whenever he wanted to." *Id.* at 378; *see id.* at 380, 383. *United States v. Muegge*, 225 F.3d 1267 (11th Cir. 2000) (per curiam), found no seizure because the public employee "was told he was free to leave at any time and did not have to answer any questions." *Id.* at 1270. *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002), turned on the fact that the police officer there "was never informed that he was the suspect for any particular crime, nor was he spoken to in a menacing or threatening manner." *Id.* at 648.

Our case is materially different from *Baird*, *Muegge* and *Driebel*. Plaintiffs weren't told they were free to leave, and they weren't told they didn't have to answer questions. *Cf. Muegge*, 225 F.3d at 1270; *Baird*, 851 F.2d at 378. Instead, plaintiffs were told they were suspects in a criminal investigation, and their superior spoke to them in a harsh, accusatory tone and threatened criminal sanctions. *Cf. Driebel*, 298 F.3d at 648. A seizure may be effected solely by "the use of language or tone of voice indicating that compliance with the officer's request would be compelled." *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987). Given the context, plaintiffs could reasonably have believed that they had to stay at the police station on pains of arrest. At least, a reasonable jury could so find.

I don't share the majority's worry that letting this case go to trial would undermine the employer's authority to insist that employees remain on duty past their shifts to answer questions. *See* maj. op. at [15a-16a]. An employer can exercise that right without difficulty if he makes it clear that the employees are not under arrest and he avoids the kind of accusations Captain Angel hurled at plaintiffs here. But where the employer brings in criminal investigators, yells at the employees, accuses them of crimes, threatens them with criminal punishment and does *not* make it clear that they're *not* under arrest, a reasonable jury could find that the employees were seized.

If plaintiffs were arrested, the seizure was unconstitutional because the police had no probable cause. *Dunaway v. New York*, 442 U.S. 200, 216 (1979). Flores never identified the officer who hit him. Instead, he claimed to have been hit by a male deputy who

was possibly Hispanic, but all of the officers in the area were Hispanic and all but one were male. That one member of a group may have committed a crime doesn't establish probable cause to arrest everyone in that group. *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991).

Nor were defendants entitled to qualified immunity because the law on unconstitutional seizures was "clearly established" at the time of the incident. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). No reasonable officer would have believed that he could arrest plaintiffs based on the evidence available. If a jury determines that plaintiffs were in fact arrested when they were detained at the police station, they would be entitled to damages – if only nominal ones for the harm they suffered as a result of the unlawful arrest. I would therefore reverse the district court's grant of summary judgment for defendants on plaintiffs' Fourth Amendment claims and remand for trial on the issue.

2. Retaliation

Plaintiffs claim that defendants retaliated against them for failing to provide statements about the Flores incident for about a year – until defendants explicitly ordered them to provide such statements. According to plaintiffs, only at that point could they be sure that their statements could not be used against them in criminal proceedings and so they reasonably remained silent to preserve their constitutional privilege against self-incrimination. If defendants had really wanted those statements, they could easily have ordered plaintiffs to provide them at any time following the incident, and thereby have removed all doubt as to whether the statements could be used to prosecute plaintiffs. Instead, defen-

dants played cat and mouse with plaintiffs for 12 months, forcing plaintiffs to guess whether any statements they gave could be used to prosecute them. In other words, defendants put economic pressure on plaintiffs to give up their Fifth Amendment rights – or so a jury could reasonably find on this record. I would therefore remand on this issue as well, and allow it to go to trial.

My disagreement with the majority proceeds along four lines:

a. First, I believe there is genuine doubt as to whether plaintiffs were under compulsion to give a statement, and thus whether any statements they gave could have been used to prosecute them. Certainly, there was no express order. The closest we have is Captain Angel's statement on the morning following the incident, where he spoke to plaintiffs in a harsh, accusatory manner and told them that they could go to prison or lose their jobs if they did not give statements. But it's not clear that this was an order; it might have been a prediction or a threat. Or, Captain Angel might have been using a variant of the Prisoner's Dilemma by suggesting that each of the officers try to save his own skin by pointing the finger at one or more of the others.

Significantly, Captain Angel mentioned that plaintiffs could go to prison if they did not make statements; disobeying an employer's order can result only in job discipline, never criminal punishment. By including the risk of prison as one of the consequences of not speaking, Captain Angel was clearly doing something other than giving a command to a subordinate. Had some of the plaintiffs given statements, and had they been used against them in criminal proceedings, the prosecution would

doubtless have claimed that plaintiffs waived their privilege against self-incrimination because Captain Angel's statement was not a command. I can't say for sure that such an argument would have failed.

Whether a person faces compulsion is a question of fact, *see United States v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1976), and plaintiffs have raised a genuine dispute as to whether they were under compulsion to give statements. A jury might well look at the situation – including the fact that defendants could have removed all doubt on the subject by giving plaintiffs a direct order – and conclude that plaintiffs were not under compulsion.

This factual dispute is material because, whether plaintiffs faced government compulsion determines whether they had immunity, which in turn determines whether they could be punished for refusing to make self-incriminating statements. Public employees *automatically* have immunity when they are compelled to make self-incriminating statements during criminal investigations related to their official duties. *See Minnesota v. Murphy*, 465 U.S. 420, 434 (1984); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). When a public employee is ordered to speak, his statements can't be used against him in a criminal proceeding, and he can therefore be subjected to adverse employment consequences for refusing to speak. *See Gardner*, 392 U.S. at 276, 278. But if plaintiffs weren't *compelled* to make self-incriminating statements, they didn't automatically have immunity. And, if they had no immunity, they were constitutionally entitled to remain silent. Reasonable jurors could find that

plaintiffs didn't have immunity, thus making it unconstitutional for defendants to punish them for refusing to make self-incriminating statements. *See Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973); *Uniformed Sanitation Men*, 392 U.S. at 283; *Gardner*, 392 U.S. at 276, 278.

b. Second, I would hold that if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak. This strikes me as the only constitutionally permissible rule. It is also the only just rule, and police officers are entitled to be treated justly and with dignity, no less than anyone else. The majority, instead, adopts the harsh and unfair rule of the Fifth and Eighth Circuits by permitting the government to punish police officers who refuse to make self-incriminating statements, even though they may not be sure whether or not they have immunity. *See Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982).

The Second, Seventh and Federal Circuits have the better approach: The government must tell public employees that they have immunity before it can constitutionally punish them for refusing to make self-incriminating statements. *See Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 & n. 4 (7th Cir. 1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y.*, 426 F.2d 619, 621, 627 (2d Cir. 1970) (Friendly, J.).[10] It's

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[10] State courts – including California where these events took place – have also adopted this position. *See, e.g., Eshelman v.*

common knowledge that the Fifth Amendment protects the privilege against self-incrimination, as this is explained in the *Miranda* warning which has "become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). A public employee under criminal investigation should be able to rely on the privilege against self-incrimination, as plaintiffs did here, until he is told in clear terms that the statements can't be used to prosecute him.

We treat immunity as a substitute for the Fifth Amendment privilege against self-incrimination because immunity "leaves the witness and the [government] in substantially the same position as if the witness had claimed his privilege." *Kastigar v. United States*, 406 U.S. 441, 458-59 (1972) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)). Usually, the government needs to affirmatively grant immunity, *see id.* at 459, which concurrently informs the witness that he has immunity. The same is not true where the immunity kicks in automatically, such as when a government employee is ordered to give a statement during the course of a criminal investigation. The employee may, first of all, have doubts as to whether or not he has been *ordered* to give the statement. This case amply demonstrates this ambiguity and there are numerous other fact patterns where it would not be clear whether the employee has been ordered to speak. I see no justification for forcing the employee to guess

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Blubaum, 114 Ariz. 376, 378-79, 560 P.2d 1283 (Ct.App.1977); *Lybarger v. City of L.A.*, 40 Cal.3d 822, 829, 221 Cal.Rptr. 529, 710 P.2d 329 (1985); *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 284, 607 P.2d 581 (1980); *City of Warrensville Heights v. Jennings*, 58 Ohio St.3d 206, 209-10, 569 N.E.2d 489 (1991).

whether or not he's been given an order and, hence, whether he has immunity. *See* pp. [25a-28a] *supra.*

But even when it is clear that the employee has been given an order, the employee may not know that this gives him automatic immunity. Automatic immunity only leaves a public employee "in substantially the same position as if the [employee] had claimed his privilege," *Kastigar*, 406 U.S. at 458-59, when the employee *knows* without a doubt that he has immunity. *See Hill*, 160 F.3d at 472-73 (Heaney, J., dissenting); *Kalkines v. United States*, 473 F.2d 1391, 1395 (Ct. Cl. 1973). After all, "[t]he logic underlying *Gardner* is that an officer under investigation is not required to speculate as to what his constitutional rights are." *Lybarger v. City of L.A.*, 40 Cal.3d 822, 834, 221 Cal.Rptr. 529 (1985) (Bird, C.J., concurring). A person who doesn't know he has immunity, like the plaintiffs here, *see* maj. op. at [5a], would justifiably believe that "any statement he [makes] may be used . . . against him." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

We can't expect public employees who are pressured to give a statement to know that they have immunity. I, for example, had no idea, even though I have been a government employee involved in law-related activities for almost three decades. The employer is in complete control of these situations, and it would be easy as pie for supervisors to inform employees that they have been ordered to speak and therefore have immunity. I can see no legitimate argument against this simple and easily administered rule, which would avoid the kind of mess we have here.

c. Third, the majority's reliance on *Chavez v. Martinez*, 538 U.S. 760 (2003), *see* maj. op. at [21a], is

misplaced because *Chavez* only applies where a party actually makes self-incriminating statements. In *Chavez*, the Supreme Court held that there is no Fifth Amendment violation when someone makes a self-incriminating statement but that statement is never used against him. *Chavez*, 538 U.S. at 769 (plurality opinion); *id.* at 777-79 (Souter, J., concurring in the judgment). The majority tries to import the *Chavez* rule – a Fifth Amendment violation can only occur when a self-incriminating statement is used against someone-into cases, like this one, where there are no self-incriminating statements. But *Chavez* itself rejected this. The Court there explicitly stated that the government couldn't "penalize public employees . . . to induce them to waive their *immunity*." *Id.* at 768 n. 2 (plurality opinion). So, under *Chavez*, the Fifth Amendment would be violated if a public employee were fired for refusing to make self-incriminating statements, even though no self-incriminating statement could ever have been used against the employee.

d. Fourth, contrary to Supreme Court precedent, the majority would only find unconstitutional retaliation for actions taken against public employees that are the "equivalent to losing one's job." Maj. op. at [20a]. The Court has rejected the argument that "only those employment decisions that are the substantial equivalent of a dismissal violate a public employee's [constitutional rights]." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (internal quotation marks omitted). Here, plaintiffs allege that they were re-assigned to less prestigious desk jobs and that they were denied promotions because they refused to make self-incriminating statements. If this was done to punish them for asserting their

constitutional rights, it would be unconstitutional, as "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her [constitutional] rights," violates the Constitution. *Id.* at 76 n. 8 (internal quotation marks omitted).

Defendants are not entitled to qualified immunity on plaintiffs' Fifth Amendment claims, because it was "clearly established," *Saucier*, 533 U.S. at 202, that plaintiffs couldn't be retaliated against for refusing to make self-incriminating statements if they didn't have immunity. *See Murphy*, 465 U.S. at 429, 436 n. 7; *Gardner*, 392 U.S. at 276, 278. Plaintiffs could thus also proceed with their conspiracy claims against the individual defendants. Additionally, municipalities aren't protected by qualified immunity, *see Owen v. City of Independence*, 445 U.S. 622, 650 (1980), so plaintiffs should likewise be entitled to proceed with their *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), claims against the County and Sheriff's Department. I would therefore reverse the district court's grant of summary judgment for defendants on plaintiffs' retaliation claims and remand for trial on these issues as well.[11]

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[11] Because I would hold that plaintiffs could establish a Fifth Amendment violation, the district court's exclusion of Sergeant Kagy's ICIB report wasn't harmless error. Rather, the district court abused its discretion in excluding the report because plaintiffs offered it for the non-hearsay purpose of proving the police department knew that plaintiffs hadn't harmed Flores months before plaintiffs were returned to their pre-investigatory duty assignments. *See Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 217 n. 36 (9th Cir. 1958).

I dissent from Parts III, IV, VI and VII. I join Part V because defendants didn't violate plaintiffs' substantive due process rights.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 03-6328 SVW(CWX)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs,
v.
LEROY BACA, ET AL.,
Defendants.

Sept. 15, 2005

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILSON, District Judge.

I. INTRODUCTION

This case arose out of a complaint by a civilian that a deputy sheriff had assaulted him. An internal police investigation ensued in which Plaintiffs, deputies in the Los Angeles County Sheriff's Department, were asked or ordered to remain at work for questioning after their shifts had ended. After brief questioning by a member of the Internal Criminal Investigations Bureau, each deputy invoked his or her Fifth Amendment rights. Plaintiffs were subsequently taken off field duty and then reassigned to other shifts. No charges were ever filed against any of the Plaintiffs, and none of the Plaintiffs was ever forced to testify in any kind of proceeding.

As a result of this incident, Plaintiffs Elizabeth Aguilera ("Aguilera"), Phillip Arellano ("Arellano"),

Benjamin Bardon ("Bardon"), Gustavo ("Gus") Carrillo ("Gus Carrillo"), and Hector Ramirez ("Ramirez") (collectively "Plaintiffs") filed the action for damages and injunctive relief under 42 U.S.C. §§ 1983 and 1988 on September 5, 2003 against Defendants Leroy Baca ("Baca"), William Stonich ("Stonich"), Larry Waldie ("Waldie"), Dennis Dahlman ("Dahlman"), William Sams ("Sams"), William McSweeney ("McSweeney"), Neil Tyler ("Tyler"), Thomas Angel ("Angel"), Arthur Ng ("Ng"), Alan Smith ("Smith"), Margaret Wagner ("Wagner"), Russell Kagy ("Kagy"), Brian Proctor ("Proctor"), the Los Angeles County Sheriff's Department ("LASD" or the "Department"), and the County of Los Angeles (the "County") (collectively "Defendants").

Plaintiffs allege violations of their Fourth Amendment right to be free from unreasonable seizures, their Fifth Amendment right against self-incrimination, their Fourteenth Amendment due process right to be free from coercive police questioning, and their Fourteenth Amendment due process right to be free from governmental conduct which shocks the conscience. Plaintiffs also allege conspiracy and municipal liability.

On June 6, 2005, Defendants filed Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Partial Summary Judgment. On June 22, 2005, Plaintiffs filed their Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment.[1]

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[1] The Court subsequently granted leave to the parties to supplement the record and file additional briefing.

For the reasons set forth below, the Court GRANTS Defendants' Motion for Summary Judgment.

II. FACTS[2]

On September 5, 2002, Plaintiffs were assigned to the East Los Angeles Sheriff's Station (the "Station") as patrol deputies. They were assigned to the early morning shift, with regularly scheduled hours from approximately 10:00 p.m. on September 4, 2002 to 6:00 a.m. or 7:00 a.m. on September 5, 2002.

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[2] As this is a motion for summary judgment, the Court must view the evidence in the light most favorable to Plaintiffs and draw all reasonable inferences in their favor. *See, e.g., Playboy Enters., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023 (9th Cir. 2004). In this case, Plaintiffs have made the Court's task unnecessarily difficult by submitting two different statements of facts with no attempt having been made to integrate them. As a result, it is not clear whether the second statement of facts merely supplements the first or supplants it. Furthermore, Plaintiffs' supplemental statement of facts relies extensively on police reports prepared by Sgt. Kagy in November and December 2002. There are several evidentiary problems with these reports. First, while it is true that police reports may in certain circumstances be admissible as a business record, *see Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir. 2000), the proponent of the report has the burden of laying a foundation for their admission. In particular, the Ninth Circuit requires that a proponent establish, through "the testimony of the custodian of the records or other qualified witness," *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985), that the business records were:

> (1) made or based on information transmitted by a person with knowledge at or near the time of the transaction; (2) made in the ordinary course of business; and (3) trustworthy, with neither the source of the information nor method or circumstances of preparation indicating a lack of trustworthiness.

The uniform of a patrol deputy consists of green pants and a tan shirt with no stripes on the sleeve. By contrast, a sergeant's uniform includes three stripes on the sleeve.

At around 1:30 a.m. on September 5, 2002, Plaintiffs and Deputy Joseph ("Joe") Carrillo ("Joe Carrillo") conducted a narcotics investigation at a residence near the intersection of Union Pacific Avenue and Indiana Street in East Los Angeles.[3] Sgt. Sean Burke ("Burke") supervised.

At around this same time, Martin Jamie Flores, a civilian (the "civilian"), called the Los Angeles Police Department ("LASD") from a pay phone near Union Pacific and Indiana to report that a single male deputy, possibly Hispanic, had struck him with a flashlight in the back and head. Paramedics were

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United States v. Catabran, 836 F.2d 453, 457 (9th Cir. 1988) (citing *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985)). In this case, Plaintiffs have proffered no testimony by any witness as to these foundational requirements. Moreover, the police reports were prepared by Sgt. Kagy two to three months after the interviews in question. Given the number of witnesses interviewed by Sgt. Kagy and the level of detail reflected in his reports, a two to three month delay is simply too great to satisfy the contemporaneity requirement of Fed.R.Evid. 803(6). *Cf. Mo. Pac. R. Co. v. Austin*, 292 F.2d 415, 423 (5th Cir. 1961) ("The more it is a part of the regular duties of a person to interview many people in many different companies on many varied situations, the more imperative is the necessity for an early recording."). Finally, the reports are laced with hearsay statements which would not be covered by the business records exception. *See Woods*, 234 F.3d at 986 ("[The] business records exception does not embrace statements contained within a business record that were made by one who is *not* a part of the business if the embraced statements are offered for their truth.") (internal quotation marks omitted).

[3] Deputy Joe Carrillo is not a plaintiff.

dispatched to the scene and transported the civilian to Doctor's Hospital.

Prior to this time, the civilian had been drinking in a bar next to the parking lot where the Plaintiffs were conducting their investigation. According to Plaintiffs, the civilian was visibly intoxicated when he exited the bar. Plaintiffs claim that the civilian repeatedly tried to talk to the suspects they were detaining and taunted Plaintiffs to free the suspects or arrest them.

At some point after 1:30 a.m., Watch Commander Abel Moreno ("Moreno") received a call from a LAPD sergeant who informed him that she was at Doctor's Hospital and a patient was alleging that he had been assaulted by a deputy sheriff. By this point, Sgt. Burke had returned to the Station. Having been informed of the civilian's allegations at the scene, Sgt. Burke notified Watch Commander Moreno. Together, they responded to Doctor's Hospital, verified the civilian's physical injuries to his head and back, and took a videotaped statement from the civilian.[4]

The civilian told Sgt. Burke and Watch Commander Moreno that he was assaulted by a deputy sheriff – the civilian indicated that there were no stripes on the assailant's sleeves – while he was walking near Union Pacific Avenue and Indiana Street. The civilian also told them that he did not think there were any witnesses.

As a result of the civilian's complaint, the Department's Internal Affairs Bureau ("IAB") began an internal investigation into the matter. Watch

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[4] The videotaped interview took place at approximately 3:50 a.m.

Commander Moreno subsequently contacted Captain Thomas Angel ("Angel") at home and informed him of the civilian's allegation and injuries.

After IAB investigators contacted the civilian at Doctor's Hospital, it was determined that investigators from the Department's Internal Criminal Investigations Bureau ("ICIB") should become involved in the investigation.[5]

At some point between 5:30 a.m. and 6:00 a.m., Plaintiffs were directed to return to the Station and wait until investigators arrived. When Plaintiffs returned to the Station, they were advised or told by Watch Commander Moreno that they should remain at the Station until they could be interviewed by Department investigators.[6]

The Department has two separate internal investigations units: IAB, which investigates administrative allegations, and ICIB, which investigates criminal allegations. Plaintiffs were aware of the difference on September 5, 2002.

By 6:00 a.m., Defendants had determined that the civilian's allegations would be investigated by ICIB. At around this same time, Sgt. Burke and Watch Commander Moreno told Plaintiff Aguilera that the

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[5] Plaintiffs' supplemental statement of facts includes details of the IAB investigators' interview with the civilian. However, since these details derive from hearsay statements contained in the inadmissible police reports, they are inadmissible.

[6] Plaintiffs claim that they were advised that the investigation was "going criminal," which they understood to mean that investigators from ICIB would be coming to the station to interview them. Although Defendants dispute this claim, the Court accepts Plaintiffs' testimony on this point.

civilian's allegations would be investigated criminally.

Sometime before 7:00 a.m., Captain Angel telephoned Commander Neal Tyler ("Tyler") to discuss the allegations.[7] Captain Angel related the information he obtained from Sgt Moreno. Captain Angel also told Commander Tyler that the deputies would be at the station until they could be interviewed by ICIB investigators.

Between approximately 7:00 and 7:45 a.m., ICIB Lt. Allan Smith ("Smith") called ICIB Sgt. James Russell Kagy ("Kagy") at home, informed him of the nature of the investigation, and ordered him to report to ICIB to conduct an investigation.

At about 8:00 a.m., Sgt. Kagy and his partner, Deborah Jones, reported to ICIB, where they received a briefing from Lt. Smith. Lt. Smith told Sgt. Kagy that the assault occurred in the vicinity of a narcotics investigation at Union Pacific Avenue and Indiana Street and identified by name the deputies who had been involved in the investigation. Sgt. Kagy and Jones then began a preliminary investigation and proceeded directly to Doctor's Hospital to contact the civilian.

After arriving at Doctor's Hospital, Sgt. Kagy learned that the civilian had been released and was with IAB Sgt. Darryl Meeks ("Sgt.Meeks"). Sgt. Kagy proceeded to the civilian's location, received a briefing from Sgt. Meeks, and interviewed the civilian. The civilian told Sgt. Kagy that he had been hit several times in the back of the head and several other places by a deputy while he was walking on

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[7] At the time, Commander Tyler was the Acting Chief of Field Operations Region One.

Union Pacific Avenue near Indiana Street and that the assault had occurred after a verbal exchange between the civilian and a deputy.

Sgt. Kagy then accompanied the civilian to the scene of the alleged assault. At the scene of the alleged assault, the civilian provided Sgt. Kagy with a reenactment of how the assault occurred, including a description of where the involved deputy was prior to the assault, the location of the pay phone from which the civilian called 911, and a description of the uniform ("beige and green with no stripes on the sleeve") that the deputy was wearing. As soon as Sgt. Kagy finished his preliminary investigation and interview of the civilian at the scene, he went directly to the Station to interview Plaintiffs. He arrived at the Station shortly before 11:30 a.m.

When Plaintiffs and Deputy Joe Carrillo returned to the Station between 5:30 and 6:00 a.m., they initially gathered in the Station's report writing room. However, at some point between 5:30 a.m. and 6:30 a.m., some of the Plaintiffs were moved to the basement briefing room. During this time, Plaintiffs were under the supervision of other sheriff's department personnel, although Plaintiffs' deposition testimony indicates that the supervision was less than constant.[8]

At approximately 6:30 a.m., Plaintiffs were directed to go to Captain Angel's office. According to Plaintiffs, Captain Angel pointed at Plaintiffs and told them in a "harsh, accusatory tone" that (1) he

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[8] For instance, Plaintiff Aguilera states that she only spent about fifteen minutes in the report writing room, with the rest of the time spent in the locker room and the secretary's office. (Aguilera Depo. 12:16-13:2.)

knew one of them had assaulted the civilian, (2) the others were covering it up, (3) one or more of them would be going to prison and would lose their jobs, and (4) the only way to avoid going to jail was to "come forward" by giving a statement to ICIB investigators. Captain Angel concluded by ordering Plaintiffs not to leave the Station and to wait in the COPS Team office until they gave a statement to the ICIB investigators.[9]

For the next five hours, Plaintiffs waited in the COPS Team office. During this time, Plaintiffs were supervised by either Lt. Wagner or Sgt. Proctor, both of whom were uniformed and armed, as were Plaintiffs. While Plaintiffs claim that the supervision was constant, their deposition testimony indicates that the supervision was somewhat more intermittent.[10] Moreover, while Plaintiffs claim that they were not allowed to get anything to eat or drink, their own testimony indicates that one or two of them used the water foundation and that either/both Lt. Wagner or/and Sgt. Proctor asked Plaintiffs if they wanted

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[9] Although Defendants dispute this claim, the Court accepts Plaintiffs testimony on this point.

[10] It appears that Lt. Wagner and Sgt. Proctor would periodically look in or walk into the office. For instance, Plaintiff Arellano stated that Sgt. Proctor simply "walk[ed] in, survey[ed], look[ed] at all of us, [and] walk[ed] out." (Arellano Depo. 69:2-5.) Likewise, Plaintiff Ramirez offered the following account of Lt. Wagner's activities:

> [She] [t]alked to Sgt. Burke, looked at some papers from Sgt. Burke, [we] listened to her tell us about the bathroom and tell us about if we want anything to eat or drink, she'll get it for us, [we] watch[ed] her poke her head in a couple of times and leave. That's about it.

(Ramirez Depo. 76:19-77:3.)

anything to eat or drink.[11] In addition, Plaintiffs were permitted to use the restroom without an escort and were never placed in handcuffs.

During this time, Plaintiffs were not put through the Department's booking or arrest procedures and were not prevented from telephoning their attorney.[12] In addition, Plaintiffs remained in possession of their LASD-issued equipment, including their weapons, and personal belongings. Indeed, several of the Plaintiffs remained in uniform.[13]

Between approximately 11:30 a.m. and 12:00 p.m., Sgt. Kagy questioned each Plaintiff individually. Sgt. Kagy asked each Plaintiff if he or she would provide him with a statement, and each declined based on the advice of counsel.[14] After each Plaintiff declined to provide a statement, Sgt. Kagy terminated the interview and Plaintiffs left the Station shortly thereafter.

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[11] For instance, Plaintiff Aguilera testified that Sgt. Proctor asked Plaintiffs if anyone was hungry and that Sgt. McLeod asked if anyone wanted anything to eat or drink. (Aguilera Depo. 68:1-8;68:23-69:7.) Likewise, Plaintiff Ramirez testified that Lt. Wagner asked Plaintiffs if they wanted anything to eat or drink. (Ramirez Depo. 76:19-77:3.) In addition, Plaintiff Arellano testified that he "stopped briefly to use [the water fountain]." (Arellano Depo. 75:21-25.) Plaintiff Bardon also testified that he "might have drank some water out of the water fountain." (Bardon Depo. 77:2-3.)

[12] At 11:00 a.m. one of the Plaintiffs used a cell phone to contact their attorney.

[13] Plaintiff Aguilera changed out of her uniform and placed her duty weapon in her locker before being ordered to wait for the investigators.

[14] Sgt. Kagy told Plaintiffs Bardon, Carrillo, Ramirez, and Arellano that they were not suspects but could not be eliminated as suspects.

Prior to leaving, each Plaintiff filled out an overtime slip. Plaintiffs were subsequently paid their normal overtime pay for the approximately six hours they were held at the Station beyond the scheduled end of their shift.

When each Plaintiff reported for his or her next shift after September 5, 2002, Lt. Smith informed him or her that his or her shift was being changed effective immediately. Plaintiffs were also pulled from patrol duty. Plaintiffs were not restored to field duty until October 2003.

Plaintiffs claim their duties and shifts were changed in retaliation for their refusal to answer Sgt. Kagy's questions. They maintain that their original shifts and duties were restored in October 2003, not because they had been cleared of wrongdoing, but because they had finally given statements to the investigators. Defendants argue in response that Plaintiffs' duties and shifts were changed as a result of the internal investigation.

On September 5, 2002, Plaintiffs were experienced deputy sheriffs. Plaintiff Bardon became a sworn deputy with the Department in 1981. Plaintiff Aguilera became a sworn deputy in 1990. Plaintiff Ramirez became a sworn deputy in 1995. Plaintiff Arellano became a sworn deputy in 1989. Plaintiff Gus Carrillo became a sworn deputy in 1996. As a result of their experience with the Department, Plaintiffs were familiar with the Department's policies and practices regarding placing individuals under arrest.

III. LEGAL STANDARD

A. Summary Judgment

Fed.R.Civ.P. 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, if the moving party will not bear the burden of proof at trial, it may satisfy its burden at summary judgment by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Fed.R.Civ.P. 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323-34; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

See Anderson, 477 U.S. at 248, 106 S.Ct. 2505, 91 L.Ed.2d 202.

B. Qualified Immunity

In a suit against an officer for an alleged violation of a constitutional right, the court must consider, as a threshold matter, whether the officer is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Qualified immunity is appropriate if the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct did not violate a clearly established constitutional right. *Id.* at 201, 121 S.Ct. 2151; *Jeffers v. Gomez*, 267 F.3d 895, 909 (9th Cir. 2001).

In ruling on a motion for summary judgment based on qualified immunity, a court must engage in two-step inquiry. *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004). First, the court must determine whether the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right. *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003) (quoting *Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272). Second, the court must determine whether the right was "clearly established." *Id.*[15]

A right is clearly established for purposes of qualified immunity when a reasonable officer, faced with the circumstances the officer confronted, would have known that the conduct attributed to the officer was unlawful. *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151, 150 L.Ed.2d 272. In determining whether the right

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[15] Of course, if the officer's conduct did not violate the plaintiff's constitutional rights, the inquiry is at an end. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151, 150 L.Ed.2d 272.

was clearly established, a court must define the right with sufficient particularity, keeping in mind the specific set of circumstances the officer encountered. *Id.* at 201-02, 121 S.Ct. 2151.

IV. DISCUSSION

Defendants move for summary judgment with respect to Plaintiffs' Fourth Amendment, Fifth Amendment, Fourteenth Amendment, conspiracy, and municipal liability claims. Defendants maintain that Plaintiffs' rights were not violated and that, even if they were, the law was not clearly established at the time that Defendants' conduct constituted a violation of Plaintiffs' constitutional rights. Plaintiffs oppose.

A. Fourth Amendment

1. Legal Principles

The Fourth Amendment protects citizens against "unreasonable searches and seizures." U.S. Const. amend. IV. "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S.Ct. 1843 (2003) (internal quotations omitted). Thus, an encounter between an officer or other government official and an individual "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991).

Though an individual need not be arrested in order for a seizure of the person to have occurred[16], the restraint on liberty typically must be effected by physical force or a show of lawful authority. *California v. Hodari D.*, 499 U.S. 621, 626-27, 111 S.Ct. 1547 (1991); *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879 n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred"). The Ninth Circuit considers five factors in determining whether a

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[16] There are two types of seizures under the Fourth Amendment: (1) investigatory stops or detentions and (2) arrests. *Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995). An investigatory stop or detention occurs when an officer briefly seizes an individual for questioning based upon a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637 (1979). The Fourth Amendment allows such stops "so long as [the police] have a reasonable, articulable suspicion that justifies their actions." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002).

In contrast to an investigatory stop or detention, a full-scale arrest must be supported by probable cause. *Allen*, 73 F.3d at 236. "There is no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest." *Gallegos*, 308 F.3d at 991 (internal quotation marks omitted). Rather, a court must consider the totality of the circumstances. *Allen*, 73 F.3d at 235. In particular, a court must consider not only how intrusive the stop was but "whether the methods used by the police were reasonable *given the particular circumstances*." *Gallegos*, 308 F.3d at 991 (internal quotation marks omitted) (emphasis in original). There is no "'mechanical checklist'" to distinguish between investigatory stops and arrests, *id.* (quoting *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988)), and there is "'no rigid time limit[]'" on investigatory stops. *Id.* at 992 (quoting *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568 (1985)).

show of force amounted to a seizure: (1) the number of officers, (2) whether weapons were displayed, (3) whether the encounter occurred in a public or non-public setting, (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled, and (5) whether the officers advised the detainee of his right to terminate the encounter. *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004); *accord Kaupp*, 538 U.S. at 630, 123 S.Ct. 1843 (identifying several factors or indicia which might indicate the existence of a seizure, "including 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled'") (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980)).

The application of the Fourth Amendment to the employment context presents special issues. This is because a court, in determining whether a seizure has occurred, must be attuned to the fact that an individual's voluntary choices may give rise to a limitation on his freedom that does not equate to a seizure by law enforcement. For instance, the mere fact that an employee does not flee his place of work when police officers arrive to conduct an investigation does not mean that the employee has been seized for purposes of the Fourth Amendment. As the Supreme Court has noted, "[W]hen people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 U.S. 210, 218, 104 S.Ct. 1758 (1984).

This principle is no less applicable in the public employment context. As one court has put it, "[T]he obligation to remain at work does not become less voluntary when owed to a public agency." *Rossi v. Town of Pelham*, 35 F.Supp.2d 58, 71 (D.N.H. 1997). Accordingly, while it is well-established that "searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment," *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492 (1987), it is reasonably clear that "the possibility or even probability of adverse employment action – as opposed to physical detention – cannot enter [the] analysis" as to whether a government employee has been seized. *Driebel v. City of Milwaukee*, 298 F.3d 622, 642 (7th Cir. 2002). Thus, "in cases involving the constitutional rights of police officers, courts must distinguish between a police department's actions in its capacity as an employer and its actions as the law enforcement arm of the state." *Id.* at 637.

Of course, the mere fact that a seizure has occurred does not mean that a violation of the Fourth Amendment has. *See Moreno v. Baca*, 400 F.3d 1152, 1156 (9th Cir. 2005) ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."). A seizure violates the Fourth Amendment only if it was objectively unreasonable under the circumstances. *Doe v. State of Haw. Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003).

In order to be reasonable within the meaning of the Fourth Amendment, an arrest must be based on probable cause. *Allen*, 73 F.3d at 236. Probable cause exists "when the facts and circumstances

within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'" *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990) (quoting *Mich. v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627 (1979)). Probable cause must be determined at the time of the arrest; evidence obtained later or as a result of the arrest cannot be used to support the existence of probable cause. *Allen*, 73 F.3d at 236.

In order to be reasonable, an investigatory stop must be based on a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown*, 443 U.S. at 51, 99 S.Ct. 2637. "The reasonable suspicion standard 'is a less demanding standard than probable cause,' and merely requires 'a minimal level of objective justification.'" *Gallegos*, 308 F.3d at 990 (quoting *Illinois v. William*, 528 U.S. 119, 123, 120 S.Ct. 673 (2000)). Nevertheless, the officer "must have a *particularized* suspicion of illegal activity." *United States v. Bravo*, 295 F.3d 1002, 1011 n. 8 (9th Cir. 2002) (emphasis added).

2. Analysis

a. Were Plaintiffs Seized Within the Meaning of the Fourth Amendment?

As a threshold matter, the Court must determine whether Plaintiffs were seized within the meaning of the Fourth Amendment. In making this determination, the Court is guided by the Seventh Circuit's decision in *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002), a case also involving allegations by experienced police officers that they had been unlawfully seized as part of an internal affairs investigation.

In *Driebel*, 298 F.3d at 627, four police officers alleged that they had been seized within the meaning of the Fourth Amendment "when they were ordered by superior officers to remain on duty or to accompany detectives to the [Milwaukee Police Department's] Internal Affairs Division and answer questions put to them during the course of criminal investigations of their activity while on duty in January and February 1998." Because the case involves two unrelated incidents involving four different officers, the court analyzed them separately.

On February 20, 1998, Officer Robert Driebel ("Driebel") was assigned to plainclothes duty during a daytime patrol shift from 7 a.m. to 3 p.m. *Id.* at 628. At 1:15 p.m., the MPD received an emergency call from the principal of a local elementary school that an "older kid" was "across the street bothering kids at the school." *Id.* Officer Driebel and his partner were dispatched to the scene. *Id.* Officer Driebel and his partner took a statement from the principal, who told them that two boys were making obscene gestures and statements to the students. *Id.* According to the principal, the boys fled and ran into a house across the street when she went to the playground to investigate. *Id.* Officer Driebel and his partner drove to the house. *Id.* When no one answered, they went back to the school to talk to students who had reportedly witnessed the incident. *Id.* After taking the statements, they returned to the house to monitor it. *Id.* Two boys matching the students' description exited the house and entered an adjoining alley. *Id.* Officer Driebel and his partner attempted to follow the boys by car, but when the boys took off running in opposite directions. *Id.* A chase ensued. *Id.* After losing one of the boys, Offi-

cer Driebel happened to spot him again. *Id.* Officer Driebel ordered the boy to stop, but the boy started to run away. *Id.* Officer Driebel started to chase him, but eventually grew tired and out of frustration threw his MPD-issued radio at the boy, striking him in the head. *Id.* Despite the injury, the boy kept running. *Id.* at 628-29. Later, the father of one of the boy filed a complaint with the MPD. *Id.* at 629.

After hearing the statements of the two boys, the investigating officer suspected that Officer Driebel was the individual who threw the radio. *Id.* After locating Driebel, he ordered Driebel to "stand by" in the police garage until given further instructions. *Id.* Driebel obeyed, waiting in the garage for what ultimately totaled four hours. *Id.* During this time, Driebel retained possession of his I.D. card, badge, and all police-issued equipment. *Id.* No one was assigned to monitor his presence, and there is no evidence Driebel was prevented from communicating with anyone during this time. *Id.* Moreover, Driebel subsequently received overtime pay for the time he was in the garage. *Id.*

In January 1998, Officers Brett Huston ("Huston"), Johnny Sgrignuoli ("Sgrignuoli"), and Stephen Pinchard ("Pinchard") were each assigned to the Gang Crimes Division of the MPD. *Id.* at 632. While on duty on January 21, Huston and Pinchard made a traffic stop of a vehicle for failing to stop at a traffic signal. *Id.* One of the four passengers was Miguel Ramos ("Ramos"), a Latino male known to have gang affiliations. *Id.* On January 23, MPD Assistant Chief Paul Koleas ("Asst. Chief Koleas") notified Deputy Inspector Dale Schunk ("Deputy Insp. Schunk") that two officers had pulled over a vehicle with four occupants, observed marijuana lying on the ground next

to the car, and allegedly threatened to arrest the occupants unless one of them agreed to obtain a single handgun for them. *Id.* That same day, the Internal Affairs Division ("IAD") learned that Ramos had filed a complaint containing substantially the same allegations. *Id.* After reviewing the relevant records, IAD concluded that Huston and Pinchard were involved in the Ramos traffic stop. *Id.* Ramos further informed the IAD detectives that Huston had paged him several times the following day. *Id.* at 632-33. At this point, the IAD launched an investigation to determine whether Huston or Pinchard might be guilty of the crime of misconduct in public office. *Id.* at 633.

In an attempt to determine the truth of the allegations, a sting operation was arranged for the early evening of January 29, 1998. *Id.* On that day, Huston, Pinchard, and Sgrignuoli were working the 5 p.m. to 1 a.m. shift on Milwaukee's south side. *Id.* As part of the sting, two handguns were placed in a dumpster on the corner of South 14th and West Mitchell. *Id.* At the instruction of the IAD, Ramos telephoned Huston and advised him that the guns were in the dumpster. *Id.* After receiving the information, Huston and Sgrignuoli drove to the location. *Id.* Sgrignuoli exited the squad car, retrieved the firearms, and placed them in the back end of the police car. *Id.* Upon observing the activity, two unmarked police cars pulled up. *Id.* Two officers exited the cars and immediately separated Huston and Sgrignuoli. *Id.*

One of the officers accompanied Sgrignuoli to the IAD offices at police headquarters in downtown Milwaukee. *Id.* at 633-34. Upon their arrival, the officer escorted Sgrignuoli to a room that was inac-

ccssible to the general public and relatively isolated from other parts of the building. *Id.* at 634. The two remained in the room for two hours before two other IAD detectives entered the room and read Sgrignuoli his *Miranda* rights. *Id.* The two officers then left, leaving Sgrignuoli alone with the officer. *Id.* Thirty minutes later, Deputy Insp. Schunk and three other IAD officers came in and informed Sgrignuoli that he was under investigation for MPD rule violations rather than criminal conduct. *Id.* Thereafter, Sgrignuoli was directed to leave and return to duty. *Id.* However, he requested to take the rest of the evening off, and his request was granted. *Id.* During the time he spent with the officer, Sgrignuoli asked what was happening; both times the officer refused to answer his queries. *Id.* Sgrignuoli was eventually paid for the time he spent waiting with the officer. *Id.*

The other officer accompanied Huston to the IAD offices. *Id.* Like Sgrignuoli, Huston was taken to an empty room, where he waited with the other officer for three hours. *Id.* at 635. The officer advised Huston that he was the subject of a criminal investigation, but refused to allow Huston to contact his attorney or union representative. *Id.* In addition, Huston was refused permission to use the bathroom unless accompanied by a detective. *Id.* After approximately three hours, an IAD detective entered the room and read Huston his *Miranda* rights. *Id.* Huston immediately requested an attorney. *Id.* Like Sgrignuoli, Huston was compensated for the time he spent with the officer. *Id.* Moreover, he was never relieved of the possession of his police-issued credentials and weapons, including his gun, I.D. card, and badge. *Id.*

Unlike his cohorts, Pinchard was allowed to drive himself to the IAD offices and go to the office on the third floor unaccompanied by any detective. *Id.* at 636. Moreover, almost immediately upon entering the office, Pinchard was read his *Miranda* rights and exercised his right to remain silent. *Id.* He remained in the room for thirty minutes, after which he was ordered to return to duty. *Id.*

In the end, the Seventh Circuit found that only one of the officers had been seized within the meaning of the Fourth Amendment. With respect to Officer Driebel, the court concluded that he had not been seized within the meaning of the Fourth Amendment when he was ordered to remain on "stand by" duty for three and a half hours in the garage. *Id.* at 642-43. In reaching its conclusion, the court noted that (1) no one prevented Driebel from leaving the garage, (2) Driebel received overtime pay, (3) Driebel retained possession of his police-issued equipment, including his gun, police identification card, badge, and locker room keys, and (4) there was no evidence that the MPD had created a coercive environment by isolating Driebel or reading him his *Miranda* rights or advising him that he was under criminal investigation. *Id.*

With respect to Officer Pinchard, the court had little difficulty finding that he was not seized within the meaning of the Fourth Amendment. *Id.* at 646. The court noted that he drove himself to the IAD offices, waited for only about thirty minutes, and was immediately returned to duty thereafter. *Id.* Under the circumstances, the court found his Fourth Amendment claim "without merit." *Id.*

With respect to Officer Huston, the court found that he had not been seized within the meaning of

the Fourth Amendment when he was accompanied to the IAD offices by the officer or when he was forced to wait for three hours at the IAD offices. *Id.* at 646-49. The court justified its conclusion that his initial encounter with the officer and drive to the IAD offices was not a seizure on the grounds that (1) the detectives made no display of their weapons, (2) the detectives did not speak in a menacing manner or make coercive statements, (3) Huston remained in possession of his MPD-issued equipment at all time, (4) Huston was not touched, and (5) Huston would have known, as a highly trained MPD officer, that MPD regulations provided that IAD detectives were vested with the power and authority to interview officers at any time and place but that force could not be used to force an officer to submit to an interview or prevent him from departing from one unless he was formally arrested. *Id.* at 646-47. The court in turn justified its conclusion that the Huston was not seized when he was required to wait three hours in the IAD office on the grounds that (1) Huston was not physically restrained, (2) Huston retained possession of his MPD-issued equipment, including his weapons, identification cards, and badges, and (3) Huston was compensated for the time he spent at headquarters. *Id.* at 647-48.[17]

With respect to Officer Sgrignuoli, the court found that he had been seized within the meaning of the

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[17] The court acknowledged that the denial of Huston's request to contact his attorney or union representative weighed against a finding of no seizure, but it ultimately discounted the significance of this fact. *Id.* at 648. Moreover, while the court found it troubling that Huston was not permitted to use the restroom without the presence of another detective, it ultimately discounted the significance of this fact. *Id.*

Fourth Amendment. *Id.* at 649. The court reached this conclusion based solely upon testimony that the officer who initially accosted Sgrignuoli physically grabbed him and turned him around. *Id.* In the court's view, a person in Sgrignuoli's position could have thought, based upon the officer's grabbing and turning him, that he was not free to leave. *Id.*

In light of *Driebel*, the Court concludes that Plaintiffs were not seized when they were ordered to remain at work to be questioned by ICIB investigators.[18] First, no force was used: Plaintiffs were never handcuffed, physically restrained, or placed in a holding cell. Second, the show of force was distinctly benign:

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[18] The Court does not find the facts of this case analogous to those in *Myers v. Baca*, 325 F.Supp.2d 1095 (C.D. Cal. 2004). First, unlike the trainees in *Myers*, Plaintiffs were experienced law enforcement officers. Second, unlike the trainees, Plaintiffs did not have their personal belongings opened up and searched. Third, unlike the trainees, Plaintiffs were not told not to speak to anyone, not to use their cell phones, not to eat or drink, and not to go to the restroom without an escort. Of course, unlike the trainees, Plaintiffs were told at the outset that they were under criminal investigation. The mere fact that a person is told he is under criminal investigation, however, does not suffice to give rise to a seizure where other factors weigh heavily against such a finding. In *Driebel*, for instance, Officer Huston was told shortly after he arrived that he was under criminal investigation. *Driebel*, 298 F.3d at 635. Nevertheless, the court found that no seizure had taken place. *Id.* at 646-49. Moreover, Plaintiffs were told they were under criminal investigation by a superior officer, not an ICIB officer. Finally, the fact that Captain Angel may have spoken in a harsh and accusatory tone does not alter the analysis. As one court has observed, "A supervisor may even use a harsh tone of voice and occasionally may 'order' an employee to do something. However, no one would think to argue in this situation that the employee was 'seized' under the Fourth Amendment." *Fedanzo v. Vroustouris*, 2001 WL 1242841, at *9 (N.D. Ill. Oct. 17, 2001).

only two officers supervised Plaintiffs, and their supervision of Plaintiffs appears to have been intermittent and not particularly intrusive. For instance, Plaintiffs were permitted to talk to one another, use their cell phones, drink from the water foundation, and use the bathroom unaccompanied by an escort.[19] Third, Plaintiffs retained possession of their LASD-issued equipment, *including their guns*. Under these circumstances, it cannot be concluded that Plaintiffs were arrested or seized.[20]

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[19] In contrast, Officer Huston was not permitted to contact his attorney or go to the bathroom unaccompanied by an escort.

[20] Indeed, the only factor which arguably weighs in favor of a seizure is the fact that Plaintiffs were told that they were under criminal investigation. However, as noted at *supra* note 18, Officer Huston was told shortly after he arrived at IAD offices that he was under criminal investigation. *Driebel*, 298 F.3d at 635. Nevertheless, the court there found that no seizure had taken place. *Id.* at 646-49. Moreover, unlike *Myers*, 325 F.Supp.2d at 1106, or *Driebel*, 298 F.3d at 635, Plaintiffs were told they were under criminal investigation by a superior, not an internal affairs' investigator. Thus, the argument for a seizure is even weaker here. Of course, Plaintiffs have may feared possible employment-related repercussions if they tried to leave, but fear of possible adverse job-related consequences cannot enter into the analysis of whether Plaintiffs were seized within the meaning of the Fourth Amendment. As the Seventh Circuit observed in *Driebel*, "[I]n cases involving the constitutional rights of police officers, courts must distinguish between a police department's actions in its capacity as employer and its actions as the law enforcement arm of the state." *Driebel*, 298 F.3d at 637. As an employer, a police department may, without violating the Fourth Amendment, order an officer to report for questioning at a designated, centralized area or some other suitable location. *Id.* Accordingly, the relevant inquiry under the Fourth Amendment is not whether a reasonable person in the officer's position would have feared for his or her job but whether he or she "would have feared *seizure or detention* if [he or she] had refused to obey the commands given by [his or her]

b. Was the Seizure Unreasonable?

Because the Court has concluded that no seizure occurred, it need not reach the issue of whether the seizure was reasonable.

B. Fifth Amendment

1. General Principles

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[21] As interpreted by the Supreme Court, the privilege against self-incrimination protects an individual against not only being compelled to testify against herself in a criminal proceeding but being forced to testify against herself in any other proceeding, criminal or civil, administrative or judicial, investigatory or adjudicatory, where her answers might incriminate her in a future criminal proceeding. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973); *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656 (1972).

An individual may be compelled to testify against herself, however, where the threat of future prosecution has been removed. *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 124 S.Ct. 2451, 2460-61 (2004); *see also Lefkowitz*, 414 U.S. at 84, 94 S.Ct. 316 (noting that testimony may be compelled if neither it nor its fruits are available for use). Accordingly, where the government grants

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superior officers." *Id.* at 642 (emphasis in original). Here, the evidence simply does not support the reasonableness of such fears.

[21] The Self-Incrimination Clause applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489 (1964).

a witness immunity from the future use of her testimony and any evidence derived from it, the government may compel the witness to testify against herself. *See Kastigar*, 406 U.S. at 453, 92 S.Ct. 1653; *see also Chavez v. Martinez*, 538 U.S. 760, 767-78, 123 S.Ct. 1994 (2003).

Where the government compels a witness to testify against herself without officially granting the witness immunity, the witness is nevertheless shielded; the government may not use her testimony or any evidence derived from it in any subsequent criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616 (1967). This immunity arises automatically and is co-extensive with the use and derivative use immunity mandated by *Kastigar*. *Chavez v. Martinez*, 538 U.S. at 769, 123 S.Ct. 1994; *see also Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n. 7 (4th Cir. 1995) (noting that the *Garrity* immunity, as it has become known, is self-executing).

2. The Fifth Amendment in the Public Employment Context

The application of the Fifth Amendment privilege against self-incrimination presents special problems when the witness is a government employee who is being called upon to testify to on-the-job or job-related misconduct which is also potentially criminal. In a series of cases involving the Fifth Amendment rights of public employees, the Supreme Court has made it clear that public employees "are entitled, like all other persons, to the benefit of . . . the privilege against self-incrimination." *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*, 392 U.S. 280, 284-85, 88 S.Ct. 1917 (1968). Nevertheless, these cases make it equally

clear that, as the Seventh Circuit has recently observed, "nothing in the [Fifth] Amendment endows public employees with greater workplace rights than those enjoyed by their counterparts in the private sector." *Driebel*, 298 F.3d at 637.

Because Plaintiffs' Fifth Amendment claim turns in large measure on a careful reading of these cases, the Court pauses to consider them. In *Garrity*, several New Jersey police officers were given the choice of either providing incriminating testimony or losing their jobs. *Garrity*, 385 U.S. at 497, 87 S.Ct. 616. The officers gave the incriminating testimony and were subsequently convicted based in part upon their testimony. *Id.* at 495, 87 S.Ct. 616.[22] On appeal, the Supreme Court held that the officers' testimony, because it had been given under the threat of discharge, was not voluntary and thus could not be used against them at trial. *Id.* at 497-500, 87 S.Ct. 616.

In *Gardner v. Broderick*, 392 U.S. 273, 274, 88 S.Ct. 1913 (1968), a New York patrolman was given the choice of either waiving his *Garrity* immunity and testifying before a grand jury or losing his job. When the patrolman refused to waive his immunity, he was discharged. *Id.* On appeal, the Supreme Court held that the officer could not be discharged for refusing to waive his immunity. *Id.* at 279, 88 S.Ct. 1913. *Accord Uniformed Sanitation Men*, 392 U.S. at 283-84, 88 S.Ct. 1917.

Taken together, *Garrity*, *Gardner*, and *Uniformed Sanitation Men* establish several propositions. First, *Garrity* establishes that testimony given under the

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[22] The trial court concluded that their statements were voluntary. *Id.* at 495 n. 2, 87 S.Ct. 616.

threat of discharge constitutes compelled testimony within the meaning of the privilege against self-incrimination and thus may not be used in a subsequent criminal prosecution. This is the so-called *Garrity* immunity which automatically attaches to compelled testimony. Second, *Gardner* and *Uniformed Sanitation Men* establish that a governmental employer may not get around the self-executing *Garrity* immunity by threatening to terminate an employee for refusing to waive her *Garrity* immunity prior to testifying. Third, both *Gardner* and *Uniformed Sanitation Men* make it clear that a governmental employer may terminate an employee for refusing to answer questions regarding the performance of her duties so long as the employer does not terminate or threaten to terminate the employee for refusing to waive her immunity. *See, e.g., Gardner*, 392 U.S. at 278, 88 S.Ct. 1913 ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.") (internal citation omitted); *Uniformed Sanitation Men*, 392 U.S. at 285, 88 S.Ct. 1917 ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional right."). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132 (1977) ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions

concerning their official duties if they have not been required to surrender their constitutional immunity.").

In a number of circuit cases within the last decade or so, these principles have been reaffirmed. In *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995), police officers and a police association brought a civil rights suit against an assistant state's attorney alleging that officers' constitutional rights were violated when they were compelled to take a lie detector test upon threat of job loss. Because the officers had not been asked to waive their privilege against self-incrimination, and the questions posed to them were narrowly job-related, the court held that the officers' Fifth Amendment rights had not been violated. *Id.* at 777. In explaining its decision, the court drew on *Gardner* and *Uniformed Sanitation Men*, noting that the language in those cases "strongly indicates that forcing a public employee to answer potentially incriminating job-related questions does not implicate the Fifth Amendment unless the employee is also compelled to waive his privilege." *Id.*

The same result was reached by the Eighth Circuit in *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998), a case involving a sheriff's department officer who was terminated after he refused to answer questions about the disappearance of a photograph of a beaten detainee and failed to show up for a polygraph examination. The sheriff's department officer alleged that the sheriff had violated his Fifth Amendment rights when he discharged him for refusing to answer the questions and failing to take the polygraph examination. *Id.* at 471. The Eighth Circuit disagreed, concluding that the officer's allegations failed to

allege the violation of a clearly established Fifth Amendment right. *Id.* Drawing on *Garrity*, *Gardner*, and *Uniformed Sanitation Men*, the court explained that the Fifth Amendment is violated "only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers." *Id.* (emphases added). Thus, a public employer may put a public employee to the choice of either testifying about the performance of official duties or forfeiting her job "[a]s long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution." *Id.* Accordingly, since the officer had not been asked to waive his privilege against self-incrimination, his dismissal did not violate the Fifth Amendment. *Id.*[23]

Finally, and most recently, the Sixth Circuit held in *Lingler v. Fechko*, 312 F.3d 237 (6th Cir. 2002), that a police officer's Fifth Amendment rights were not violated when he was ordered to prepare a report detailing his involvement in the disappearance of some of the department's furniture. Citing *Wiley*, the court held that no Fifth Amendment violation had occurred because the officer had not been compelled to waive his privilege against self-incrimination and because his statements were never used against him in a subsequent criminal proceeding. *Id.* at 239-40.

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[23] In rejecting the officer's claims, the court also rejected the officer's argument that the sheriff's mere failure to expressly offer immunity constituted an impermissible attempt to compel a waiver of immunity. *Id.*

3. Analysis

In light of the teachings of *Garrity*, *Gardner*, and *Uniformed Sanitation Men* and such recent cases as *Lingler*, *Hill*, and *Wiley*, Plaintiffs' Fifth Amendment claim cannot stand. Plaintiffs were not compelled to answer Sgt. Kagy's questions or to waive their immunity.[24] Since, as the Eighth Circuit has explained, the Fifth Amendment is violated "only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers," *Hill*, 160 F.3d at 471, no Fifth Amendment violation occurred here.

Nor does the mere fact that the Department may have altered Plaintiffs' shifts or job duties in response to their refusal to answer Sgt. Kagy's questions give rise to an actionable Fifth Amendment claim. As the *Garrity* line cases make clear, a public employer may take adverse employment actions against a public employee who refuses to answer questions narrowly tailored to the performance of her job duties. So long as the employer is not penalizing the employee's refusal to waive her immunity or attempting to compel the employee to waive her immunity, no violation of the Fifth Amendment has occurred. In this case, Plaintiffs were never asked to waive their immunity, and indeed never did waive their immunity. Accordingly, no Fifth Amendment violation occurred.

Moreover, Plaintiffs' Fifth Amendment claim fails for an additional reason: since Plaintiffs were never charged with a crime, let alone tried for one, no use

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[24] Moreover, Sgt. Kagy's questions were narrowly tailored to the performance of their job duties.

of their statements has ever been made. In *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994 (2003), the Supreme Court held that a violation of the Self-Incrimination Clause does not occur absent the use of the compelled testimony in a criminal case.[25] Therefore, since Plaintiffs have never been charged with a crime, let alone tried for one, their Fifth Amendment claim must fail under *Chavez*.[26]

C. Fourteenth Amendment

Plaintiffs allege two violations of the due process clause of Fourteenth Amendment. First, Plaintiffs allege that Defendants violated their right to be free from coercive police interrogations. Second, Plaintiffs allege that Defendants violated their right to be free from governmental conduct that shocks the conscience.

Neither of these claims is properly analyzed under the due process clause of the Fourteenth Amendment. As the Supreme Court has repeatedly held,

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[25] In reaching this judgment, the Court rejected the view that the use of compulsive questioning, standing alone, violates the Fifth Amendment. *Id.* at 766-73. In an opinion joined by the Chief Justice and Justices Scalia and O'Connor and which expressed the judgment of the Court, Justice Thomas reached this conclusion based on a close reading of the text of the Fifth Amendment and the Court's prior case law. *Id.* In a concurring opinion joined by Justice Breyer, Justice Souter reached this conclusion by carefully balancing the costs and benefits of adopting the Ninth Circuit's rule. *Id.* at 777-79 (Souter, J., concurring). Whatever the rationale, however, the Court squarely rejected the view that compulsive questioning by itself can violate the Fifth Amendment.

[26] Although the Ninth Circuit has limited the application of *Chavez* to § 1983 cases, *see United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005), this is a § 1983 case and is thus governed by *Chavez*.

"Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865 (1989)) (internal quotation marks omitted). *See also United States v. Lanier*, 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219 (1997) (explaining that where a "constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Fontana v. Haskin*, 262 F.3d 871, 881-82 (9th Cir. 2001) (rejecting the plaintiffs' substantive due process claim because her claim was better analyzed under the Fourth Amendment).[27] Thus, since Plaintiffs' claims are covered by the Fourth and Fifth Amendments, they must be analyzed under the Fourth and Fifth Amendments, as the Court did above. Nevertheless, even if analyzed under the Fourteenth Amendment, Plaintiffs' claims fail.

1. *Right to be Free from Coercive Police Interrogations*

Plaintiffs assert that Defendants violated their right to be free from coercive police interrogations.[28]

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[27] Of course, where a plaintiff's claim is not covered by a specific constitutional provision, it is properly analyzed as a substantive due process claim. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708 (1998).

[28] Under Ninth Circuit precedent, a coercive interrogation exists where "the totality of the circumstances shows that the officer's tactics undermined the suspect's ability to exercise his

In making this claim, Plaintiffs rely on *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

In *Cooper*, the Ninth Circuit held that the plaintiff stated a cause of action under § 1983 for a violation of his right to be free from coercive police interrogations where he alleged that the police had interrogated him for hours without properly administering the *Miranda* warning and without heeding his repeated requests to remain silent. *Id.* at 1244-48. The facts indicated that the police conducted the unlawful interrogation in a deliberate and premeditated attempt to extract statements which, even if not admissible as part of the prosecution's case-in-chief, would deter the plaintiff from testifying or invoking an insanity plea and would have served as fodder for impeachment if the plaintiff had elected to testify. *Id.*

As even this cursory summary of *Cooper* indicates, the facts of this case are dramatically different. Unlike the officers in *Cooper*, Sgt. Kagy did not interrogate Plaintiffs for hours. At most, he questioned them for a few minutes. Nor did Sgt. Kagy ignore repeated requests by the Plaintiffs to remain silent; on the contrary, he terminated the questioning as soon as Plaintiffs invoked their Fifth Amendment rights. Under the benchmark established by *Cooper*, Plaintiffs' allegations simply do not rise to the level of coercion necessary to state a claim for coercive police questioning. *Cf. Cunningham v. City of Wenatchee*, 345 F.3d 802, 810-11 (9th Cir. 2003) (holding that an eight-hour interrogation did not rise

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free will." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003).

to the level of a coercive interrogation where the plaintiff was given a break for food and water).

2. Right to be Free from Government Conduct That Shocks the Conscience

The Supreme Court has held that governmental conduct which shocks the conscience violates the due process clause of the Fourteenth Amendment. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952). The threshold question in such cases is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708 (1998). The type of conduct which is most likely to rise to the "conscience-shocking level" is "conduct intended to injure in some way unjustifiable by any government interest." *Id.* at 849. Nevertheless, conduct which was not intentional may rise to the conscience-shocking level in some circumstances. *Id.* at 849-50 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S.Ct. 2979 (1983)).

In *Cooper*, the Ninth Circuit found that the plaintiff stated a viable claim under § 1983 that the defendants had violated his right to be free from governmental conduct that shocks the conscience. *Cooper*, 963 F.2d at 1248-50. But as detailed above, the facts here bear no comparison to those alleged in *Cooper*. Moreover, even apart from *Cooper*, the facts here do not shock the conscience. Simply put, Sgt. Kagy's conduct in questioning Plaintiffs for several minutes but immediately terminating the questioning upon their invocation of their Fifth Amendment rights is not so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.

Accordingly, Plaintiffs' shock-the-conscience claim fails.

D. Clearly Established Nature of the Right

1. Legal Principles

Because the Court has determined that Defendants did not violate Plaintiffs' Fifth Amendment or Fourteenth Amendment rights, the Court need not turn to the second step of the two-part analysis set forth by the Supreme Court in *Saucier*: whether the law regarding the constitutional right violated by Defendants was clearly established at the time of the constitutional violation. *Saucier*, 533 U.S. at 200. *See also Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003). Nevertheless, the Court will undertake the "clearly established" inquiry simply to illustrate that Defendants' conduct, even if violative of Plaintiffs' constitutional rights, did not violate clearly established rights.

As the Supreme Court has repeatedly emphasized, the "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Indeed, "'the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987)). In other words, "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. If a reasonable officer "could have reasonably but erroneously believed that his or her conduct did not violate

[Plaintiffs'] rights," then qualified immunity must be granted. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

The officer's conduct is measured according to the state of the law as of the date of events giving rise to the lawsuit-that is, "officials are charged with knowledge of constitutional developments at the time of the alleged constitutional violation." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057, 110 S.Ct. 867 (1990). In determining whether the law was clearly established at such time, a court "need not look to a case with identical or even 'materially similar' facts." *Serrano*, 345 F.3d at 1077 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739-41, 122 S.Ct. 2508 (2002)). "[S]tate officials are not entitled to qualified immunity simply because no case with materially similar facts has held their conduct unconstitutional. The standard is one of fair warning: where the contours of the right have been defined with sufficient specificity that a state official had fair warning that her conduct deprived a victim of his rights, she is not entitled to qualified immunity." *Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003) (citations omitted).

"A right can be clearly established even though there was no binding precedent in this circuit" at the time of the alleged violation. *Lum*, 876 F.2d at 1387. Where there is no binding precedent, courts in the Ninth Circuit "look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Id. Accord Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996); *Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1985). If there is no on-point

Ninth Circuit authority and are few other cases on point, then a court may "evaluate the likelihood that this circuit or the Supreme Court would have reached the same result as courts that had already considered the issue." *Lum*, 876 F.2d at 1387. *Accord Osolinski*, 92 F.3d at 936; *Figueroa*, 7 F.3d at 1409.

Finally, it should be noted that several cases have indicated that a court's analysis in determining whether a constitutional violation has occurred is relevant to determining whether the right was clearly established – that is, if the court's analysis reveals that the question of whether a constitutional right has been violated is a close one, that is a factor that weighs in favor of a finding that the right in question was not clearly established. *Mena v. City of Simi Valley*, 332 F.3d 1255, 1266 (9th Cir. 2003); *Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004).

2. Analysis

a. Plaintiffs' Fourth Amendment Right to be Free from Unreasonable Seizures

i. Was it clearly established that Defendants' conduct constituted a seizure?

Even if the Court had found that a seizure took place, it would not necessarily follow that it was clearly established at the time that Defendants' conduct in this context constituted a seizure. Indeed, as the Court noted above, the Seventh Circuit held in *Driebel* that Huston had not been seized even though he had been advised that he was under criminal investigation. *Driebel*, 298 F.3d at 635, 646-49. Moreover, to the extent that *Driebel* held that Huston had not been seized because (1) he had not been physically restrained, (2) he retained possession

of his department-issued equipment, and (3) he was compensated for the time he spent at headquarters, *id.* at 647-48, a reasonable officer would have concluded, based on *Driebel*, that Defendants' conduct here did not constitute a seizure. Accordingly, it was not clearly established at the time that Plaintiffs were seized within the meaning of the Fourth Amendment.[29]

ii. Did Defendants' conduct in seizing Plaintiffs violate a clearly established right?

Even if the Court had found that an unreasonable seizure had taken place, it would not necessarily follow that Defendants violated a clearly established right. Indeed, the facts of this case are so unusual, and the case law involving the existence of probable cause in analogous situations is so unsettled, that it simply was not clearly established at the time that Defendants conduct violated a clearly established right.[30]

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[29] The Court notes that this Court's decision in *Myers* had not been decided at the time of the events of this case.

[30] The Court assumes, for the sake of argument, that Plaintiffs' detention, if it constituted a seizure, constituted an arrest. Nevertheless, the Court notes that there are "'no rigid time limit[s]'" on investigatory stops, *see Gallegos*, 308 F.3d at 992 (quoting *Sharpe*, 470 U.S. at 685, 105 S.Ct. 1568); *cf. United States v. Hbaiu*, 202 F.Supp.2d 1177, 1184-85 (D. Kan. 2002) (finding that a one hour, forty-five minute detention was an investigatory stop), and that the conduct at issue here, though intrusive in terms of time, was not particularly intrusive in terms of space or the methods used. Although Plaintiffs were confined to a particular location, they were free to use the restroom without an escort and were not prevented from using their cell phones. Moreover, they were not touched, searched, handcuffed, or placed in a holding cell. Finally, there is no evidence that Sgt. Kagy purposefully delayed his investigation, and in-

To be reasonable, an arrest must be supported by probable cause. *Allen*, 73 F.3d at 236. Probable cause exists "when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe 'that the suspect has committed, is committing, or is about to commit an offense.'" *Barry*, 902 F.2d at 773 (quoting *DeFillippo*, 443 U.S. at 37). Of course, probable cause does not require certainty. "[A]s the very name implies, we deal with probabilities [in dealing with probable cause]." *Brinegar*, 338 U.S. at 175; *see also Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795 (2003) ("The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities . . . ."). Whether an arrest was supported by probable cause is judged based on what was known at the time of the arrest; evidence obtained later or as a result of the arrest cannot be used to support the existence of probable cause. *Allen*, 73 F.3d at 236.

At the time of Plaintiffs' alleged seizure, Defendants had the following facts in their possession: (1) Plaintiffs had participated in a narcotics investigation near the intersection of Union Pacific and Indiana Avenues in East Los Angeles at around 1:30 a.m., (2) a civilian telephoned the LAPD at about 1:40 a.m. to report that a single male deputy, possibly Hispanic, had crossed Union Pacific and struck him with a flashlight in the back and head, and (3) Sgt. Burke and Watch Commander Moreno had verified the civilian's physical injuries to his head

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deed Plaintiffs were interviewed by him shortly after he got to the Station.

and back and had obtained a videotaped statement from the civilian.

Taken together, these facts certainly made it more likely than not that one of the deputies was the assailant. Indeed, given the fact that there is no evidence that other deputies were in the vicinity at that time, simple logic dictates that one of the deputies *had* to have been the assailant.[31] Nevertheless, the civilian's description was vague, and the specificity of a victim's description is one of the factors which informs the probable cause determination. *Cf. Washington v. Lambert*, 98 F.3d 1181, 1190-91 (9th Cir. 1996) (stating the same proposition with respect to reasonable suspicion; by implication, it applies to probable cause).[32] The question thus becomes whether a reasonable officer would have known that the circumstantial evidence which Defendants had in their possession, namely, that the deputies were the only deputies in the vicinity at that time – did not suffice to establish probable cause with respect to all of the deputies given the fact that the civilian's description was too vague to establish probable cause with respect to them.

While it is true that, as Plaintiffs note, that it was clearly established at the time that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to

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[31] While one of the Plaintiffs is a woman, she is Hispanic, was in uniform, and did participate in the narcotics investigation at that location. Moreover, it was night time.

[32] In a case decided after the facts at issue in this case, the Ninth Circuit squarely held that a general resemblance to a vague description cannot, as a matter of law, give rise to probable cause. *Grant v. City of Long Beach*, 315 F.3d 1081, 1088 (9th Cir. 2002).

probable cause," *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338 (1979), Plaintiffs were not suspects because they were in the proximity to others independently suspected of criminal activity; they were suspected because they were in the immediate vicinity and generally matched the description provided by the civilian. Thus, *Ybarra* is not directly on point.

Nor is Plaintiffs' attempt to analogize this case to *United States v. Brown*, 951 F.2d 999 (9th Cir. 1991), convincing. In that case, the Ninth Circuit held that membership in a corrupt police unit does not, without more, establish probable cause to arrest an individual officer within that unit. *Id.* at 1003. In this case, however, Plaintiffs were not suspects because of their membership in a particular unit; they were suspects because they were in the immediate vicinity of the assault and because they each generally matched the civilian's description.

Instead, the Court finds the Ninth Circuit's decision in *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986), and the Supreme Court's decision in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795 (2003), instructive.[33] In *Rutherford*, the plaintiff alleged that he had been assaulted and battered by several police officers. *Id.* at 1445. The officers did not deny arresting the plaintiff or being at the scene, but they did deny beating him. *Id.* At trial, the plaintiff was unable to identify which of the defendants actually kicked or punched him but did testify

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[33] Plaintiffs attempt to distinguish *Rutherford* on the ground that it arose in the context of a directed verdict. However, while the standard for a directed verdict is not identical to the standard for probable cause, both turn on what a reasonable person could infer from the facts. Thus, the posture in which *Rutherford* arose does not preclude its application here.

to seeing them around him at the time of the beating. *Id.* At the close of the plaintiff's case, the district court directed a verdict in favor of the defendants. *Id.* at 1445-46. On appeal, the Ninth Circuit reversed. *Id.* at 1448. Noting that the plaintiff had testified to seeing the officers at the time of the beating and that the "officers agreed that they were among the five or six officers who detained, arrested, and handcuffed [the plaintiff]," the court explained that "a jury could reasonably infer that the named officers were participants in punching or kicking [the plaintiff]." *Id.*

Here, as in *Rutherford*, the civilian could not identify which deputy struck him. Nevertheless, the civilian described his attacker as a deputy sheriff, and Plaintiffs and Deputy Joe Carrillo were the only deputies on the scene at the time.[34] To be sure, there is a distinction between the facts of *Rutherford* and the instant case: there, the officers were in the plaintiff's immediate presence at the time of the alleged assault, and the plaintiff was able to identify which officers were surrounding him at the time. Here, by contrast, the civilian testifies to only one deputy being in his immediate presence, and is unable to identify which one. Nevertheless, the facts of the two

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[34] Some of the Plaintiffs have submitted affidavits indicating that they were inside the residence being searched for part of the time. However, as it is not clear when the civilian was hit or when Plaintiffs were inside the residence, their declarations do not alter the analysis. Moreover, only those facts which the Department or Sgt. Kagy knew at the time are relevant to the probable cause inquiry. Plaintiffs have not shown that this information was known to the Department or Sgt. Kagy at the time.

cases do bear a resemblance.[35] In *Pringle*, an officer discovered drugs and a large quantity of cash in a car with three occupants.[36] *Id.* at 368. When the officer was unable to determine which of the three occupants owned the money and drugs, he arrested all three. *Id.* at 368-69. Subsequently, one of the passengers confessed to owning the drugs and money, and was convicted. *Id.* at 369. On appeal, the Supreme Court held that the officer had probable cause to arrest the passenger. *Id.* at 371-72. The Court explained:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle commit-

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[35] While the Ninth Circuit held in *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002), that *Rutherford* does not permit "an inference of individual liability . . . based on merely being present at the scene of [a] search," that case is distinguishable. In that case, there was *no* description of the officer who committed the alleged constitutional violation. The *only* evidence consisted of the fact that the officers were present at the scene. Here, by contrast, there was a description, one which Plaintiffs generally matched.

[36] Although *Pringle* was decided after the events at issue in this occurred, the fact that the Court granted certiorari in that case suggests that the existence of probable cause in a *Pringle*-like situation was unclear at the time. Indeed, as a leading treatise on Section 1983 indicates, "[t]he reach of the Court's decision in [*Pringle*] is uncertain." 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 3.19[B], at 3-636.3 (4th ed. 2005-2 Supplement). Finally, to the extent that the facts of the instant case are even more unique than those at issue in *Pringle*, it can hardly be said that Defendants' conduct violated clearly established law.

> ted the crime of possession of cocaine, either solely or jointly.

Id. at 372. While the facts of *Pringle* can also be distinguished from the instant case, Defendants faced a similar situation here: one of a small group of individuals had to be the assailant. Not only did each of the Plaintiffs answer to the general description provided by the civilian – (1) all were deputy sheriffs, (2) all had been involved in an investigation near Indiana Street and Union Pacific Avenue at around 1:30 a.m., and (3) all were Hispanic – but there were no other deputies matching the civilian's description in the vicinity at that time. True, an automobile is a more confined setting than an intersection, but the logical principle remains the same.

In light of *Rutherford* and *Pringle*, it cannot be said that the issue of whether probable cause exists in a situation like the instant one was clearly established at the time. This is not, after all, a case in which the victim provides a bare-bones description that matches an innumerable number of people. *See, e.g.*, *Grant*, 315 F.3d at 1088; *Commonwealth v. Jackson*, 459 Pa. 669, 331 A.2d 189 (1975). Nor is this a situation like *Brown* in which officers are suspected of wrongdoing solely because of their membership in a particular unit. Here, the civilian's description and the circumstantial evidence of the deputies' presence at the scene indicated that the entire universe of possible suspects consisted of Plaintiffs and Deputy Joe Carrillo. Given these unusual circumstances, the Court cannot say that a reasonable officer would have known that probable cause did not exist.

b. Plaintiffs' Fifth Amendment Privilege Against Self-Incrimination

Given the complexity of the application of the Fifth Amendment to the public employment context, and given the consistent line of authority holding that conduct such as Defendants' does not violate the Fifth Amendment, it cannot be said that Defendants' conduct in questioning Plaintiffs and in subsequently reassigning them violated a clearly established right. Indeed, Plaintiffs have not cited a single case in which a Fifth Amendment violation was found in similar circumstances. Accordingly, no reasonable officer could have known that Defendants conduct violated clearly established law.

c. Plaintiffs' Fourteenth Amendment Due Process Rights

Given the gross disparity between Defendants' conduct here and the conduct of the officers in *Cooper*, it can hardly be said that *Cooper* would have put a reasonable officer on notice that Defendants' conduct here clearly violated Plaintiffs' Fourteenth Amendment rights. Accordingly, even if Defendants had violated Plaintiffs' due process rights, they would be entitled to qualified immunity.

E. Conspiracy Claim

In order to prove a conspiracy under § 1983, the plaintiff must show an agreement or meeting of the minds between the alleged conspirators. *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002); *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1126 (9th Cir. 1989); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc). To prevail, the plaintiff need not show that each participant knew the exact details of the

conspiracy, but she must establish that each participant shared a common objective. *Franklin*, 312 F.3d at 441; *United Steelworkers*, 865 F.2d at 1541. Plaintiffs have failed to make any showing that Defendants shared a common objective.

In any event, a conspiracy claim under § 1983 is not actionable unless there has been an actual deprivation of the plaintiff's constitutional rights. *Woodrum*, 866 F.2d at 1126. Since Defendants did not deprive Plaintiffs of any of their constitutional rights, Plaintiffs' conspiracy allegation fails as a matter of law.

F. Monell *Claim*

A municipality may be held liable under § 1983 for an officer's unconstitutional conduct where the officer's conduct was pursuant to a municipal custom or policy, even one not formally approved by the municipality's decisionmaking body. *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978). A municipality may not be held liable under § 1983, however, where the officer's conduct did not actually violate the plaintiff's constitutional rights, even if the municipality has a custom or policy which authorizes or causes constitutional violations. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571 (1986) (per curiam); *Quintanilla v. City of Downey*, 84 F.3d 353, 355 (9th Cir. 1996).

Because Defendants did not violate Plaintiffs' constitutional rights, Plaintiffs' *Monell* claim fails as a matter of law.

V. CONCLUSION

Because Plaintiffs were not seized within the meaning of the Fourth Amendment, Defendants did not violate Plaintiffs' Fourth Amendment rights. Because Defendants did not compel Plaintiffs to waive their rights under the Fifth Amendment or attempt to use Plaintiffs' statements against them in a subsequent criminal case, Defendants did not violate Plaintiffs' Fifth Amendment rights. Finally, because Defendants' conduct did not shock the conscience or constitute coercive police conduct analogous to that at issue in *Cooper*, Defendants did not violate Plaintiffs' due process rights under the Fourteenth Amendment. Finally, because the law governing Defendants' conduct was not clearly established at the time, Defendants are entitled to qualified immunity even if their conduct did violate Plaintiffs' rights. Accordingly, Defendants' Motion for Summary Judgment [60] is hereby GRANTED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56617

(D.C. No. CV-03-06328-SVW
Central District of California, Los Angeles)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs-Appellants,
v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL.,
Defendants-Appellees.

[Filed Feb. 12, 2008]

ORDER

Before: KOZINSKI, Chief Judge, KLEINFELD, and TALLMAN, Circuit Judges.

Judges Kleinfeld and Tallman have voted to deny the petition for panel rehearing and the petition for rehearing en banc. Chief Judge Kozinski has voted to grant the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 03-06328 SVW(CWX)

(Honorable Stephen V. Wilson)

ELIZABETH AGUILERA, ET AL.,
Plaintiffs,

v.

LEROY BACA, ET AL.,
Defendants.

[Filed Sept. 26, 2005]

JUDGMENT

WILSON, District Judge.

I. INTRODUCTION

On September 19, 2005, the Court, having entered an Order granting summary judgment in favor of Defendants Leroy Baca, William Stonich, Larry Waldie, William McSweeney, Neal Tyler, Thomas Angel, Arthur Ng, Allan Smith, Margaret Wagner, James Russell Kagy, Bryan Proctor, Los Angeles County Sheriff's Department, and County of Los Angeles (collectively "Defendants"),

IT IS HEREBY ORDERED that judgment be entered on all claims in favor of Defendants Leroy Baca, William Stonich, Larry Waldie, William McSweeney, Neal Tyler, Thomas Angel, Arthur Ng, Allan Smith, Margaret Wagner, James Russell Kagy, Bryan Proctor, Los Angeles County Sheriff's

Department, and County of Los Angeles and against Plaintiffs Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, Gustavo Carrillo, and Hector Ramirez (collectively "Plaintiffs"), and that Defendants recover their costs against Plaintiffs pursuant to a Bill of Costs to be filed by Defendants.

Dated: 9/23/05

/s/ STEPHEN V. WILSON
Honorable Stephen V. Wilson
United States District Court Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

May 7, 2008

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N. W.
Suite 400
Washington, DC 20036

Re: Elizabeth Aguilera, et al.
v. Leroy Baca, Individually and as Sheriff of
Los Angeles County, California, et al.
Application No. 07A872

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on May 7, 2008 extended the time to and including June 11, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ HEATHER TRANT

Heather Trant
Case Analyst

[attached notification list omitted]